DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-930
Title: Alejandro Mayorkas, Director, United States Citizenship and Immigration Services, et al., Petitioners

v.

Rosalina Cuellar de Osorio, et al.

Docketed: January 25, 2013
Linked with 12A612
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-56786, 09-56846)
Decision Date: September 26, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 13 2012	Application (12A612) to extend the time to file a petition for a writ of certiorari from December 25, 2012 to January 25, 2013, submitted to Justice Kennedy.
Dec 18 2012	Application (12A612) granted by Justice Kennedy extending the time to file until January 25, 2013.
Jan 25 2013	Petition for a writ of certiorari filed. (Response due February 25, 2013)
Feb 22 2013	Order extending time to file response to petition to and including May 3, 2013.
May 3 2013	Order further extending time to file response to petition to and including May 24, 2013.
May 24 2013	Brief of respondents Rosalina Cuellar de Osorio, et al. in opposition filed.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 6 2013	Reply of petitioner Alejandro Mayorkas, Director, United States Citizenship and Immigration Services, et al. filed. (Distributed).
Jun 24 2013	Petition GRANTED.
Jul 26 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 3, 2013.
Jul 26 2013	The time to file respondents' brief on the merits is extended to and including October 28, 2013.
Aug 19 2013	Motion to dispense with printing the joint appendix filed by petitioner Alejandro Mayorkas, Director, United States Citizenship and Immigration Services, et al.
Sep 3 2013	Brief of petitioners Alejandro Mayorkas, Director, United States Citizenship and Immigration Services, et al. filed.
Sep 17 2013	SET FOR ARGUMENT ON Tuesday December 10, 2013.
Sep 17 2013	CIRCULATED
Sep 19 2013	Records received from USCA for the Ninth Circuit. (electronically filed available through PACER)

Sep 19 2013	Records received from USDC for the Central District of California (electronically filed).
Oct 7 2013	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 28 2013	Brief of respondents Rosalina Cuellar de Osorio, et al. filed. (Distributed)
Nov 4 2013	Brief amicus curiae of Catholic Legal Immigration Network Inc. filed. (Distributed)
Nov 4 2013	Brief amici curiae of Immigration Advocacy Organizations filed. (Distributed)
Nov 4 2013	Brief amici curiae of Current and Former Members of Congress filed. (Distributed)
Nov 12 2013	Letter from counsel for amici curiae Immigration Advocacy Organizations received.
Nov 27 2013	Reply of petitioners Alejandro Mayorkas, Director, United States Citizenship and Immigration Services, et al. filed. (Distributed)
Dec 10 2013	Argued. For petitioners: Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Mark C. Fleming, Boston, Mass.

PETITION FOR WRIT OF CERTIORARI

12-930

No.

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the primary beneficiary. The primary beneficiary's "spouse or child" may be a derivative beneficiary of the petition, "entitled to the same status[] and the same order of consideration" as the primary beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 ("age out"), and therefore lose "child" status, after the filing of visa petitions as to which they are beneficiaries.

The questions presented are:

1. Whether Section 1153(h)(3) unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary.

2. Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3).

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are Alejandro Mayorkas, Director, United States Citzenship Immigration Services; Janet Napolitano, Secretary of Homeland Security; Lynne Skeirik, Director, National Visa Center; Christina Poulos, Acting Director, California Service Center, United States Citizenship and Immigration Services; and Hillary Rodham Clinton, Secretary of State.

Respondents, who were plaintiffs in the district court and appellants in the court of appeals, are Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, Norma Uy, Ruth Uy, and Teresita G. Costelo and Lorenzo P. Ong, individually and on behalf of a class of others similarly situated.

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In the Supreme Court of the United States

No.

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-35a) is reported at 695 F.3d 1003. The vacated opinion of the court of appeals panel (App., *infra*, 36a-60a) is reported at 656 F.3d 954. One opinion of the district court (App., *infra*, 61a-78a) is reported at 663 F. Supp. 2d 913; the other (App., *infra*, 79a-84a) is not published in the Federal Supplement but is available at 2009 WL 4030516.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 26, 2012. On December 18, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 87a-109a.

STATEMENT

This case involves the proper interpretation of 8 U.S.C. 1153(h)(3), which addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, after the filing of a visa petition as to which he is a beneficiary. The meaning of that provision is a question that split the en banc Ninth Circuit by a vote of 6 to 5, has divided the courts of appeals, and has serious implications for administration of the visa system.

1. a. Under the INA, United States citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The INA limits the total number of family-sponsored immigrant visas issued each year, see 8 U.S.C. 1151(c); establishes various "preference" categories that classify and prioritize different types of family members, see 8 U.S.C. 1153(a); caps the number of visas that may be issued in those categories each year, see *ibid.*; and places annual limitations on

the number of natives of any single foreign state who can obtain visas in each category, see 8 U.S.C. 1152(a)(2).

The INA establishes the following "preference" categories for family-sponsored ("F") visas:

> F1: unmarried sons or daughters (age 21 or older) of U.S. citizens
>
> F2A: spouses or children (unmarried, under age 21) of lawful permanent resident aliens
>
> F2B: unmarried sons or daughters (age 21 or older) of lawful permanent resident aliens
>
> F3: married sons or daughters of U.S. citizens
>
> F4: brothers or sisters of U.S. citizens

See 8 U.S.C. 1153(a)(1)-(4); see also 8 U.S.C. 1101(b)(1) (definition of "child").[1]

A citizen or lawful permanent resident seeking an immigrant visa for a family member in one of those categories must file a petition with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.[2] See 8 U.S.C.

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[1] Petitions by U.S. citizens on behalf of an "immediate relative"—that is, a spouse, child (under age 21), or parent, see 8 U.S.C. 1151(b)(2)(A)(i)—are not considered "preference" petitions, and are subject to fewer restrictions. The INA also permits the issuance of visas to aliens in employment-based categories, see 8 U.S.C. 1151(d), 1153(b), and aliens from countries with historically low immigration rates to the United States, see 8 U.S.C. 1153(c); see also 8 U.S.C. 1159 (providing for adjustment of status of asylees and refugees).

[2] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Some residual statutory references to the

1154(a)(1); 8 C.F.R. 204.1(a)(1); USCIS, Form I-130, Petition for Alien Relative, http://www.uscis.gov/files/form/i-130.pdf. The family member sponsored by the petitioner is known as the primary (or principal) beneficiary.

When a preference petition is filed, USCIS assesses it and—if it meets applicable requirements—approves it. 8 U.S.C. 1154(b). That approval does not result in immediate issuance of a visa to the primary beneficiary, however. The beneficiary receives a place in line to wait for a visa to become available. Within family-preference categories, the order of the line is determined by the petition's priority date—that is, the date when it was filed with the agency. See 8 U.S.C. 1153(e); 8 C.F.R. 204.1(b); 22 C.F.R. 42.53(a).

Every month, the State Department publishes a visa bulletin with various cut-off dates for each family-preference category. See 8 C.F.R. 245.1(g)(1); 22 C.F.R. 42.51. When the applicable cut-off date is later than the petition's priority date, the priority date is "current," and a visa is available. In order to obtain the visa and become a lawful permanent resident alien, the primary beneficiary must submit an application, pay fees, demonstrate continued eligibility, and complete consular processing (if abroad) or obtain adjustment of status (if present in the United States). See 8 U.S.C. 1153(g), 1201(a), 1255.

Given the annual limitations on the total number of visas that may be granted for a particular family-preference category (as well as separate limitations on the number of natives of a single country who may

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Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

receive visas in any given year), the waiting line for visa availability is often quite long. For instance, Filipino F4 primary beneficiaries (brothers and sisters of U.S. citizens) whose priority dates are now current have been waiting for more than 20 years. See U.S. Dept. of State, Visa Bulletin, http://travel.state.gov/visa/bulletin/bulletin1360.html (last visited Jan. 24, 2013).

A primary beneficiary of a preference petition who advances to the head of the line can also aid certain "derivative" beneficiaries—the primary beneficiary's spouse and unmarried children under age 21. Derivative beneficiaries are "entitled to the same status[] and the same order of consideration provided" to the primary beneficiary with respect to a pending petition. 8 U.S.C. 1153(d) (describing derivative beneficiaries as "accompanying or following to join[] the spouse or parent"). Accordingly, if a visa is available to a primary beneficiary, it is available to a derivative beneficiary as well. See *ibid.* But by the time the primary beneficiary's priority date becomes current, a child who qualified as a derivative beneficiary when the petition was originally filed may have "aged out"—that is, passed his or her twenty-first birthday. See 8 U.S.C. 1101(b)(1). If that happens, the aged-out person can no longer claim derivative-beneficiary status. See 8 U.S.C. 1154(e).

b. In 2002, Congress enacted the Child Status Protection Act (Act), Pub. L. No. 107-208, 116 Stat. 927. In a provision now codified at 8 U.S.C. 1153(h), the Act modified the visa system to grant relief to certain aged-out persons.

Section 1153(h)(1) addresses the passage of time between the filing of a visa petition and agency ap-

proval of the petition. It provides that "a determination of whether an alien satisfies the age requirement * * * shall be made using * * * the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), * * * reduced by * * * the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. 1153(h)(1); see *ibid.* (conditioning this reduction on the alien having "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of [visa] availability"); see also *Martinez* v. *Department of Homeland Sec.*, 502 F. Supp. 2d 631, 636 (E.D. Mich. 2007) (explaining that prior to enactment of Section 1153(h)(1) the relevant date for purposes of determining an alien's qualification for "child" status was the date of adjudication of an "application for permanent residency" filed after a visa became available).

Section 1153(h)(2), to which Section 1153(h)(1) refers, describes a set of relevant petitions. It states that "[t]he petition described in this paragraph is" an F2A petition naming a child as a primary beneficiary or any petition including a child as a derivative beneficiary and the child's parent as a primary beneficiary. 8 U.S.C. 1153(h)(1); see 8 U.S.C. 1153(a)(2)(A) (providing for F2A petitions); 8 U.S.C. 1153(d) (providing that a child may be a derivative beneficiary of various petitions).

Together, these provisions permit certain aged-out beneficiaries to retain "child" status. For example, if USCIS took three years to approve a visa petition

filed when an alien was age 18 and a visa became available one year after approval, an alien who met the requirements of Section 1153(h)(1) would be treated for purposes of the statute as if he were 19 years old rather than 22 years old.

Section 1153(h)(3), which is the subject of this case, addresses the passage of a distinct period of time—the time between the approval of a petition and the availability of a visa. It provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3).

c. The Board of Immigration Appeals (Board or BIA) interpreted Section 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), a decision that helps illustrate how the visa preference system operates in practice. Wang was the primary beneficiary of an F4 visa petition filed by his sister, a U.S. citizen. See *id.* at 29; 8 U.S.C. 1153(a)(4). When the F4 petition was filed, Wang's daughter was a minor and a derivative beneficiary of the petition under 8 U.S.C. 1153(d). The petition was approved after a short while, and Wang and his daughter waited for a visa to become available. Approximately a decade later, Wang received a visa and was admitted to the United States as a lawful permanent resident. See 25 I. & N. Dec. at 29. By that time, however, his daughter was over 21 (even subtracting the small amount of time between the filing of the F4 petition and its approval), and she no longer qualified for derivative-beneficiary

status. See *id.* at 32; see also 8 U.S.C. 1101(b)(1) (definition of "child"), 1153(d) (identifying derivative beneficiaries to include the "child" of the primary beneficiary).

Wang then filed a new petition with USCIS on behalf of his daughter—an F2B petition, in the category that covers filings by lawful permanent residents on behalf of their unmarried sons and daughters who are over age 21. See 8 U.S.C. 1153(a)(2)(B). Immigration authorities approved the F2B petition filed on behalf of Wang's daughter, but gave it a priority date corresponding to the date on which it was filed, not the date on which the earlier F4 petition had been filed by Wang's sister on behalf of Wang himself. See 25 I. & N. Dec. at 29.

The Board rejected the argument that Section 1153(h)(3) dictated a different result. The Board explained that "the language of section [1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The Board also explained that "[i]n immigration regulations, the phrase 'automatic conversion' has a recognized meaning," which includes a requirement that the petitioner be the same before and after conversion. *Id.* at 34 (citing, *inter alia*, 8 C.F.R. 204.2(i)); see *id.* at 35 ("Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). The Board concluded that Congress had acted consistent with the accepted understanding of that term, discerning nothing in the legislative history of the Act signaling an intent to give special priority status to derivative beneficiaries who age out of "child" status

as a consequence of statutory limits on the number of visas issued each year. *Id.* at 37-38.

The Board therefore held that Section 1153(h)(3) did not apply to Wang's daughter. See 25 I. & N. Dec. at 38-39. The earlier F4 petition had been filed by Wang's sister, who had no relationship with Wang's adult daughter that would qualify her for a visa—that is, there is no family preference category for nieces (or nephews) of U.S. citizens. Thus, the petition filed by the aunt could not automatically convert to an existing category. Wang's F2B petition also could not retain the priority date of the original F4 petition, because the two petitions were filed by different petitioners. See *id.* at 35.

2. This certiorari petition arises out of suits filed by two groups of plaintiffs in federal district court in 2008 claiming that immigration authorities incorrectly denied relief under Section 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions. The first suit was brought by parents who were primary beneficiaries of F3 and F4 petitions filed in the 1980s and 1990s, and who sought to retain the priority dates of those petitions with respect to F2B petitions they later filed on behalf of their adult sons and daughters. See App., *infra*, 11a, 68a-69a; see also *id.* at 68a-69a (noting that some of the sons and daughters also joined the suit as plaintiffs). The plaintiffs sought "declaratory and mandamus relief," alleging that USCIS arbitrarily and capriciously failed to grant the requested priority dates in violation of 8 U.S.C. 1153(h)(3). App., *infra*, 43a.

The second suit was brought by similarly situated parents seeking to benefit their aged-out children by forcing the government to assign priority dates from

decades-old F3 and F4 petitions to new F2B petitions. App., *infra*, 11a-12a, 44a. In that case, the district court certified a class consisting of "[a]liens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3)." *Id.* at 81a.

The district court granted summary judgment to the government in both cases. Noting that "[t]he factual circumstances of these cases are similar to those in *Wang*," the court concluded that Section 1153(h)(3) is ambiguous and held that the Board's interpretation of that provision in *Wang* was reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 68a, 72a, 83a.

3. The cases were consolidated for appeal, see App., *infra*, 45a, and a Ninth Circuit panel unanimously affirmed the judgments in favor of the government, see *id.* at 60a. The panel found Section 1153(h) ambiguous and deferred to the Board's interpretation of the provision.

The panel rested its holding on a close reading of Section 1153(h)(3) and related provisions. The panel explained that Section 1153(h) could be read to apply to all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person

over the age of 21, without any need for the filing of a new petition by a different petitioner. App., *infra*, 50a-54a; see *id.* at 54a-55a (explaining that it is "entirely possible" to read Section 1153(h)(3) as granting priority date retention only where automatic conversion is also available). The panel concluded that *Chevron* deference to the Board's interpretation was appropriate. In the panel's view, the agency's reading of Section 1153(h)(3) "accords with the ordinary usage of the word 'automatic' to describe something that occurs without requiring additional input, such as a different petitioner," and represents "a reasonable policy choice for the agency to make." *Id.* at 57a-60a (quoting *Chevron*, 467 U.S. at 845).

4. a. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a divided 6-5 decision. The majority opinion concluded that "the plain language of the [Act] unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries" and that the Board's contrary interpretation "is not entitled to deference." App., *infra*, 3a; see *id.* at 24a ("Automatic conversion and priority date retention are available to all visa petitions identified in [Section 1153](h)(2).").

The majority primarily relied on cross-references between the various subsections of Section 1153(h). Section 1153(h)(1) sets forth a formula that calculates whether an alien's age is over 21 for purposes of the applicable "age requirement," and covers petitions described in Section 1153(h)(2); the "petition[s] described in [that] paragraph" are F2A petitions under 8 U.S.C. 1153(a)(2)(A) naming a child as a primary beneficiary and any petitions as to which a child is a

derivative beneficiary under 8 U.S.C. 1153(d). 8 U.S.C. 1153(h)(1)-(2). While Section 1153(h)(3) does not refer to paragraph (h)(2), it does refer to paragraph (h)(1), because it applies only if "the age of an alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). The majority concluded that because "[paragraph] (h)(3) * * * cannot function independently," and "[paragraph] (h)(1) explicitly applies to the visas described in [paragraph] (h)(2)," Congress has clearly provided that paragraph (h)(2) defines which petitions are covered by paragraph (h)(3). App., *infra*, 15a-16a. Accordingly, the majority continued, "both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries" may "automatically convert to a new appropriate category (if one is available)" and "retain the priority date of the original petitions for which they were named beneficiaries." *Id.* at 16a.

Having determined that the statutory language was clear, the majority addressed what it identified as questions of "impracticability" concerning the availability of "automatic[]" conversion under its reading of Section 1153(h). App., *infra*, 19a-23a (citing *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). The majority acknowledged that "[f]or an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner"—the aged-out person's parent, assuming that after the parent's visa becomes available she is granted lawful permanent resident status and thus becomes eligible to file a petition for her adult child. App., *infra*, 18a. The majority also acknowledged that it may take some time for a new petition to be filed, and that such a petition might never be filed at all. See *id.* at 21a-22a

& n.4. But the majority did not believe that those issues "render[ed] automatic conversion impracticable," *id.* at 21a; it characterized them instead as merely "present[ing] administrative complexities that may inform USCIS's implementation." *Id.* at 22a; see *id.* at 21a-22a (stating that such complexities include "[t]he lag time while a parent receives his visa and adjusts status" to become a lawful permanent resident and "the possibility that conversion for an aged-out derivative is never possible"). Finally, the majority believed that its reading made more sense than the Board's narrower interpretation because, in the majority's view, Congress likely did not intend to benefit only a small category of aged-out persons and "barely modif[y] the regulatory regime that existed at the time the [Act] was enacted." *Id.* at 22a-23a (citing 8 C.F.R. 204.2(a)(4)).

The majority recognized the existence of a circuit conflict on the proper interpretation of Section 1153(h)(3). As the majority explained, its ruling accorded with that of the Fifth Circuit, while the Second Circuit reached the opposite result, ruling that Section 1153(h)(3) unambiguously bars relief for any alien whose existing petition cannot be "automatically converted," without the need for a new petitioner. App., *infra*, 12a-13a (citing *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), and *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011)). The majority concluded, however, that "[t]he existence of a circuit split does not itself establish ambiguity in the text of the [Act]." *Id.* at 17a.

The majority also acknowledged that its ruling would have a substantial adverse effect on aliens who receive no benefit from Section 1153(h)(3). If aged-out beneficiaries are permitted to "retain their priori-

ty dates when they join new preference category lines," the majority noted, that "will necessarily impact the wait time for other aliens in the same line," who will suddenly find more people ahead of them in the quest for visas that are made available only in small, "statutorily fixed" numbers. App., *infra*, 23a. The majority did not attempt to assess the equities of that result or to read the language of the statute in light of those equities. See *ibid.*

b. Five judges dissented in an opinion authored by Judge Milan Smith, Jr. The dissent agreed that Section 1153(h)(3) could be read to "include F3 and F4 derivative beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2)." App., *infra*, 27a-28a. But in the dissent's view, such a reading could not be squared with three other aspects of Section 1153(h)(3): "(1) that a petition must be converted 'to the appropriate category[';] (2) that only 'the alien's petition' may be converted; and (3) that the conversion process has to occur 'automatically.'" *Id.* at 28a. Automatic conversion is not possible, the dissent explained, because "[t]he children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own." *Id.* at 29a. The dissent also explained that although the majority relied on the assumption that the aged-out person's parent would become a lawful permanent resident and file a new petition naming that person, such a filing may not happen for some

time or at all, and "[a]n action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at 30a. The dissent criticized the majority for "ignoring statutory language contrary to its interpretation before finding the plain meaning clear." *Id.* at 28a, 31a-32a.

Finally, the dissent recognized the real-world implications of the majority's ruling, which would "shuffle the order in which individual aliens get to immigrate," and therefore require a change in the administration of visa waiting lists and a substantial increase in many aliens' already protracted wait times for visas, App., *infra*, 34a-35a: "If F3 and F4 derivative beneficiaries can retain their parents' priority date, they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship." *Id.* at 35a.[3]

REASONS FOR GRANTING THE PETITION

By a 6-5 margin, the en banc Ninth Circuit has held that Section 1153(h)(3) grants special priority status to all aged-out derivative beneficiaries, refusing to defer to the contrary interpretation of the Board of Immigration Appeals. That ruling misinterprets the provision's text and misapplies *Chevron*—and, in doing so, deepens an existing conflict among the circuits.

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[3] The court of appeals stayed its mandate pursuant to Federal Rule of Civil Procedure 41, pending the filing and disposition of a petition for certiorari. 09-56786 Docket entry Nos. 100, 102 (9th Cir. 2012).

It also threatens serious disruption of the visa program by which relatives of U.S. citizens and lawful permanent residents immigrate to this country or adjust their status. This Court should grant review and correct the Ninth Circuit's error.

A. The Ninth Circuit Incorrectly Refused to Grant *Chevron* Deference to the Board's Interpretation Of Section 1153(h)(3)

1. a. The Ninth Circuit's conclusion that Section 1153(h) is unambiguous does not withstand scrutiny. Congress has not "unambiguously expressed" an intent to grant special priority status to aged-out derivative beneficiaries like those who seek relief in this case. *Chevron*, 467 U.S. at 842-843.

The en banc majority reached its conclusion without coming to terms with the text of Section 1153(h)(3) providing that "the alien's petition shall automatically be converted to the appropriate category." The existence of that specification of the manner in which Section 1153(h)(3) is to operate refutes the Ninth Circuit's conclusion that the provision unambiguously applies to all derivative beneficiaries. With respect to a derivative beneficiary named in an F3 or F4 petition who ages out, there is no "appropriate category" to which "the alien's petition"—that is, the *existing* petition covering the alien—can be "converted." In the case of an F3 petition (for married sons and daughters of U.S. citizens), the original petitioner is the aged-out person's U.S. citizen grandparent, and Congress has not provided for a citizen to file a petition to obtain an immigrant visa on behalf of a grandson or granddaughter. See 8 U.S.C. 1153(a). In the case of an F4 petition (for a U.S. citizen's brother or sister), the original petitioner is the aged-out person's U.S. citizen

aunt or uncle, and there likewise is no statutory category that allows a citizen to petition for a visa on behalf of a niece or nephew. See *ibid.*

In addition, as the en banc dissent explained (App., *infra*, 29a-31a), a change in classification could not take place "automatically" in those circumstances. If the parent of an aged-out derivative beneficiary of an F3 or F4 petition receives a visa and becomes a lawful permanent resident, the parent might then choose to file a new F2B petition naming the now adult son or daughter as a primary beneficiary. See 8 U.S.C. 1153(a). But such a new petition, filed by a new petitioner, cannot possibly be filed immediately after the derivative beneficiary ages out, see 8 U.S.C. 1153(h)(1); App., *infra*, 21a n.4, because some time must necessarily elapse between the date when the visa becomes available to the parent and the date when he or she establishes eligibility (if all requirements are met) and actually is granted lawful permanent resident status. See, *e.g.*, 8 U.S.C. 1153(g) (allowing up to one year for an alien to apply for a visa after one becomes available); 8 U.S.C. 1201(a), 1255 (governing processes by which an alien who qualifies for a visa can attain the right to reside in the country as a lawful permanent resident). Indeed, a new petition might never be filed at all; the aged-out person's parent might not submit an F2B petition even when capable of doing so. It is difficult to see how a shift from an F3 or F4 petition filed by one person to a new F2B petition that might or might not be filed later by a different person can reasonably be characterized as "automatic[]"—let alone as a "conver[sion]" of "the alien's petition." 8 U.S.C. 1153(h)(3); see App., *infra*, 30a.

That conclusion is reinforced by the well-understood meaning of the term "convert[]" in this area of immigration law: a seamless reclassification of a single petition from one currently valid category to another currently valid category. See *Agosto* v. *INS*, 436 U.S. 748, 754 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels the contrary." (citation omitted)). For instance, 8 C.F.R. 204.2(i), which was in place years before the Act was passed, provides for "[a]utomatic conversion of preference classification" from one category to another under circumstances (for example, a change in the beneficiary's marital status, or the naturalization of the petitioner) that do not require the filing of a new petition. And 8 U.S.C. 1151(f)(2), which was enacted alongside Section 1153(h), expressly contemplates "conversion" in that very sort of situation (naturalization of the parent). See also 8 U.S.C. 1151(f)(3), 1154(k)(1). The Board, with its extensive expertise in this area, agreed that "the term 'conversion' has consistently been used" to refer to a move from one visa category to another without the filing of a new petition. *Wang*, 25 I & N. Dec. at 35.[4]

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[4] Section 1153(h)(3) provides that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3). That language cannot be read to provide unambiguously that priority-date retention and automatic conversion are separate benefits, such that retention is available even when conversion is not. See App., *infra*, 32a-33a, 54a. That is particularly true in light of the fact that Congress expressly unyoked those two benefits elsewhere in the Act. See

The cross-references in Section 1153(h) on which the en banc majority relied (App., *infra*, 15a-16a) do not provide an unambiguous statement of congressional intent that trumps these considerations. To qualify for relief under paragraph (h)(3), an aged-out person must have been subjected to the formula set out in paragraph (h)(1) and had his age computed as 21 or older. But it does not follow that every person whose age is computed under paragraph (h)(1)—that is, every beneficiary of a petition identified in paragraph (h)(2)—must also qualify for the distinct form of relief described in paragraph (h)(3). Rather, the persons who qualify for that further benefit can reasonably be understood to be a subset of beneficiaries of the persons covered by paragraph (h)(2). Particularly in light of the statutory language referring to "automatic[]" conversion, Section 1153(h)(3) cannot be said clearly to encompass the broader group.

Finally, there is no extra-textual reason to believe that Congress intended to grant the distinct benefit and preferred status of "grandfathered" priority dates to all aged-out former beneficiaries. Nothing in the legislative history indicates such an intent—a silence that would be surprising if Congress truly meant to enact a far-reaching change in immigration policy with substantial effects on aliens waiting for visas. See App., *infra*, 34a-35a; *Wang*, 25 I & N. Dec. at 36-38; pp. 28-32, *infra* (discussing effects of Ninth Circuit's

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8 U.S.C. 1154(k)(3) (stating that certain petitioners may retain their priority dates "[r]egardless of whether a petition is converted under this subsection or not"). In any event, "the concept of 'retention' of priority dates has always been limited" to a situation in which there was a successive petition filed by the same petitioner. *Wang*, 25 I & N. Dec. at 35; see, *e.g.*, 8 C.F.R. 204.2(a)(4).

interpretation of the statute). Rather, Congress was focused on ameliorating the effects of a particular problem relating to administrative delays in approving petitions, see *Wang*, 25 I. & N. Dec. at 36 (explaining that "the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications"); H.R. Rep. No. 45, 107th Cong., 1st Sess. 2 (2001), while avoiding "displac[ement]" with respect to aliens who were already "waiting patiently," *Wang*, 25 I. & N. Dec. at 37 (quoting 148 Cong. Rec. H4992 (daily ed. July 22, 2002)); see 147 Cong. Rec. H2902 (daily ed. June 6, 2001); see generally *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).

b. The en banc majority was able to conclude that Section 1153(h)(3) is unambiguous only by shunting the discussion of any statutory language undermining that conclusion into a separate analysis of whether USCIS would be able to implement the different priority system the court's interpretation would mandate. See App., *infra*, 19a-23a. That was a misapplication of *Chevron*. In order to determine whether a statute is unambiguous to begin with, a court must employ the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including examination of *all* of a provision's language as well as consideration of the statutory and regulatory structure into which it fits, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). The court of appeals erred in breaking the provision into pieces and deeming it unambiguous on

the ground that one of the pieces, considered in isolation, appeared to have a clear meaning. That is especially true because the provision being interpreted here, 8 U.S.C. 1153(h)(3), consists of a single unitary sentence. To be sure, one tool of construction is an analysis of whether an interpretation is so unworkable or "so bizarre that Congress 'could not have intended' it," *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991) (citing *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))—but that inquiry does not substitute for the basic requirement of a close reading of the entirety of the language that Congress chose.

In any event, the majority's attempt to explain why there are no difficulties associated with its understanding of how Section 1153(h)(3) operates is unconvincing. First, the majority stated that the reference in Section 1153(h)(3) to an "original petition" could be read to "suggest[] the possibility of a new petition," indicating that "automatic conversion could require more than just a change in visa category." App., *infra*, 20a. But the phrase "original petition" is most naturally read as a way of referring to a single petition *prior to* its conversion. 8 U.S.C. 1153(h)(3). Under that reading, Section 1153(h)(3) provides that when "the alien's petition" is transformed through conversion, it nevertheless "retain[s]" the priority date that was "issued upon receipt" of the petition in its "original" state. *Ibid.*

Second, the majority tried to brush past the difficulties associated with "automatic[]" conversion of a new F2B petition that might be filed on behalf of an adult son or daughter sometime after the date when that person had aged out as a derivative beneficiary under category F3 or F4. App., *infra*, 21a-22a. The

majority was forced to acknowledge, however, that uncertainty and "lag time" associated with the prospect of a new filing create "administrative complexities" and "unresolved procedural questions." *Ibid.* That is a source of statutory ambiguity—since the conversion that the majority envisioned would not be "automatic[]" within the ordinary meaning of that word—and not simply a problem of administration for the agency to surmount as best it may. See *id.* at 22a ("It is the agency's task to resolve these complications, not the court's.").

Finally, the majority expressed concern that an interpretation of Section 1153(h)(3) that gives force to the "automatic[]" conversion language would not significantly "modif[y] the regulatory regime that existed" when the provision was enacted. App., *infra*, 22a-23a. But there is no reason to believe that Congress wanted to make a major shift in policy, rather than to take the more modest step of giving statutory force to the agency's existing practices—including by use of terms with a recognized meaning in the immigration field. Cf. *Kucana* v. *Holder*, 130 S. Ct. 827, 838 (2010). The narrower interpretation adopted by the Board does add to the benefits already expressly conferred by regulation, making conversion "automatic[]," without requiring any additional petition (and corresponding fee), for aged-out derivative beneficiaries moving from the F2A category (which covers a lawful permanent resident's spouse and minor child) to the F2B category (which covers a lawful permanent resident's unmarried adult son or daughter). See 8 U.S.C. 1153(h)(3).[5]

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[5] See also, *e.g.*, Gov't C.A. Br. 38-39 (explaining that "[u]nder *Wang*, lawful permanent residents are no longer required to file

2. Because the en banc majority resolved the appeal at *Chevron* step one, it did not address whether the Board's interpretation of Section 1153(h)(3) in *Wang* is a reasonable one that is entitled to deference. See *Chevron*, 467 U.S. at 843-844; see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009) (according *Chevron* deference to Board's interpretation of a provision of the INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same). The standard for what constitutes an expert agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted).

As the en banc dissent (and the original Ninth Circuit panel) correctly explained, the Board's decision is indeed a reasonable one—a conclusion that follows

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separate petitions once their sons and daughters turn 21 years old"); Gov't C.A. Br. at 34 n.4, *Li* v. *Renaud*, *supra* (No. 10-2560-cv) (same). Prior to enactment of Section 1153(h)(3), the available relief was more limited. See 8 C.F.R. 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner."). Although this regulation has not been revised following the enactment of the Act, its requirement that a new petition be filed for an aged-out derivative beneficiary of an F2A petition has been superseded by Section 1153(h)(3). This Office has been informed by the Department of Homeland Security and Department of State that administration of these provisions by agency personnel in the field in the wake of the Act has not always been uniform, but their position is, as required by Section 1153(h), that no separate petition is needed.

naturally from the interpretation of Section 1153(h)(3) set forth above. App., *infra*, 34a-35a, 57a-60a. The Board's reading of the provision gives meaning to the reference to automatic conversion, and does so in a manner consistent with past practice in immigration statutes and regulations. See *Wang*, 25 I. & N. Dec. at 39 (explaining that Section 1153(h)(3) affords relief to primary and derivative beneficiaries of F2A petitions who become eligible for F2B classification when they age out of child status). That reading also recognizes that a contrary interpretation would "not permit more aliens to enter the country or keep more families together," but would negatively affect many aliens who have been patiently waiting in visa lines for long periods of time. App., *infra*, 35a. And it makes a "reasonable policy choice," *Chevron*, 467 U.S. at 845, not to depart from past practice and disrupt visa administration in order to reduce the wait times for independent adults, see App., *infra*, 35a.

B. The Courts Of Appeals Are Split On The Meaning Of Section 1153(h)(3)

The ambiguity in Section 1153(h)(3) is highlighted by the varying interpretations reached by the courts of appeals that have considered its significance. The circuits are divided over whether Section 1153(h)(3) should be read to afford relief to derivative beneficiaries like the ones in this case, and review by this Court's is therefore warranted.

In *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011), the Second Circuit reached a result directly contrary to the Ninth Circuit's decision here. The plaintiff in *Li* was the primary beneficiary of an F2B family-preference petition filed by her father in 1994, at a time when her son was 15 years old; by the time a visa

became available, however, her son was 26 years old, and thus had aged out of derivative-beneficiary status. See *id.* at 379. Because there is no family-preference category under which a grandfather can seek a visa for his grandson, a new petition was required. See *id.* at 381. When the plaintiff—by then a lawful permanent resident—filed a separate F2B petition in 2008 naming her adult son as the primary beneficiary, she argued that he was entitled to the priority date associated with her father's earlier petition filed on her behalf. See *id.* at 379. The Second Circuit rejected that argument, ruling that Section 1153(h) did not create "a statutory right to have [the] 2008 petition receive a 1994 priority date." *Id.* at 380; see *id.* at 382-383.

The Second Circuit read Section 1153(h)(3) to unambiguously *reject* the very reading adopted by the Ninth Circuit, and thus to *deny* special relief to aged-out derivative beneficiaries who seek to "retain" a priority date "to use for a different family preference petition filed by a different petitioner." *Li*, 654 F.3d at 382-383. The court first explained that automatic conversion and retention of priority date are not "distinct and independent" statutory "benefits," noting that Congress knew how to "decouple" those benefits but had "clearly" chosen not to do so in the provision at issue. *Id.* at 383-384 (citing 8 U.S.C. 1154(k)). The court then considered whether the plaintiff's petition could automatically be "converted to the appropriate category," 8 U.S.C. 1153(h)(3), and concluded that it could not. The court pointed out that "[a]s used in the [Act] and prior regulations," that phrase "refers to a petition in which the category is changed, but not the petitioner." 654 F.3d at 384; see also *id.* at 384-385.

In the court's view, then, that language "unambiguously expressed" Congress's intent to include only "a change—without need for an additional petition—from one classification to another, not from one person's family sponsored petition to another." *Id.* at 384-385.

In sharp contrast, in *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), the Fifth Circuit expressly rejected the Second Circuit's reasoning in *Li* and reached the same conclusion as the en banc Ninth Circuit in the decision below. See *id.* at 374-375. The case involved a typical aging-out fact pattern: Khalid's mother was named as the primary beneficiary of an F4 petition filed by Khalid's aunt in 1996, at which time Khalid was 11 years old. See *id.* at 365. His mother did not reach the front of the visa line until 2007, however, and by the time she became a lawful permanent resident Khalid was 22 years old. See *id.* at 366. Immigration authorities denied Khalid's request to assign a priority date of 1996 to the new F2B petition his mother filed on his behalf in 2007. See *ibid.*; see also *id.* at 368 (stating that "[t]he facts of *Matter of Wang* are essentially identical to the facts of this case").

Because the Fifth Circuit found that Section 1153(h)(3) unambiguously entitled Khalid to the relief he sought, the court of appeals did not progress beyond step one of the *Chevron* analysis. The court acknowledged that Section 1153(h)(3) does not internally define which petitions qualify for automatic conversion and priority-date retention, since that provision "refers only to 'the alien's petition' and 'the original petition.'" 655 F.3d at 370. Like the Ninth Circuit en banc majority, however, the court placed

heavy reliance on the fact that Section 1153(h)(3) refers to the formula set forth in Section 1153(h)(1), and Section 1153(h)(2) defines which petitions are covered under Section 1153(h)(1): any F2A petition naming a child as a primary beneficiary as well as any petition under which a child is a derivative beneficiary. See *ibid.*; see also 8 U.S.C. 1153(h)(2). The court concluded that paragraph "(h)(3) must operate on this same set of petitions"—and that the Second Circuit had erred by failing to recognize that point. 655 F.3d at 371, 373-375; see *id.* at 371 (noting various "parallels" between the subsections of Section 1153(h)); *id.* at 372 (stating that "past practices regarding conversion and retention" might "factor into the analysis" if "the text were more murky"). The Fifth Circuit was also skeptical of the Second Circuit's reading because it would confer only a "meager benefit." *Id.* at 374 (citing 8 C.F.R. 204.2(a)(4)).

These various court of appeals decisions, which arrive at such different conclusions about the purportedly "unambiguous" meaning of Section 1153(h)(3), cannot be reconciled with each other. Cf. *Robles-Tenorio* v. *Holder*, 444 Fed. Appx. 646, 649 (4th Cir. 2011). This Court's review is warranted to clarify the meaning of Section 1153(h)(3) and to determine whether the Board's considered interpretation of that provision is entitled to *Chevron* deference. See *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance."); *Chen* v. *Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (stating that national uniformity is "paramount" in applying immigration laws (quoting *Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006)).

C. The Ninth Circuit's Rule, If Allowed To Stand, Would Have A Substantial Effect On The Administration Of The Immigration Laws And The Availability of Visas To Other Aliens

If the Ninth Circuit's decision were put into effect, the consequences would be serious and far-reaching. It does not appear to be possible, as a practical matter, to implement that decision in a limited way. Rather, to carry out the Ninth Circuit's instructions as to the proper operation of Section 1153(h)(3), the visa-waiting system would likely have to be overhauled. Accordingly, the priority dates of thousands of aliens awaiting visas would have to be adjusted, and as a result other aliens would experience significantly increased waiting times, thus disrupting the settled expectations of those aliens and their U.S.-citizen or lawful-permanent-resident family members. The reordering of the visa waiting lines and the processing of a large number of petitions with new, earlier priority dates would also place a tremendous administrative burden on the responsible agencies.

The number of aliens who could obtain earlier priority dates under the Ninth Circuit's interpretation of Section 1153(h)(3) could be in the tens of thousands, or even higher. See generally U.S. Dept. of State, Immigrant Waiting List by Country 6-7, http://www.travel.state.gov/pdf/WaitingListItem.pdf (last visited Jan. 24, 2013) (stating that approximately 90,000 aliens immigrate in the F3 and F4 categories every year). There is, however, no mechanism in place to track which pending petitions include as derivative beneficiaries persons who have since aged out, and no way of knowing how many new visa petitions or applications naming them would be filed in the future. Indeed, one

consequence of the Ninth Circuit's ruling might be that there is no time limit on an aged-out beneficiary's ability to claim an "original" priority date; under that ruling, years or even decades could pass between the time that the beneficiary aged out and the time that the claim is asserted. See App., *infra*, 74a; see also 8 U.S.C. 1153(g).

The family-preference visa waiting lines that would be affected by the Ninth Circuit's interpretation of Section 1153(h)(3) are those for F1, F2B, and F3 visas.[6] Most of the aged-out beneficiaries who would directly benefit by obtaining an earlier priority date would likely do so via the F2B line, which covers petitions filed by lawful permanent residents on behalf of their unmarried adult sons and daughters. See 8 U.S.C. 1153(a). Some of those beneficiaries are already waiting in that line as a result of new F2B petitions filed on their behalf, but would now claim an earlier priority date than the one they are currently accorded. Others would join the line for the first time and claim the priority date under which their parents gained visas, because some number of new lawful

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[6] Although the cases before the Ninth Circuit involved family-preference petitions, the language in the en banc decision could be read to extend to employment-based visa petitions, which operate similarly and which are covered by subsection (b) of Section 1153. See App., *infra*, 24a; 8 U.S.C. 1153(h)(2) (describing with respect to derivative beneficiaries "a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section"); *Matter of Jyoti R. Patel*, No. A089 726 558, at 1-3 (B.I.A. Jan. 11, 2011) (unpub.) (relying on *Wang* to reject argument made by aged-out derivative beneficiary of employment-based petition filed on his mother's behalf). Under such a reading, the effects described below would be even more pronounced.

permanent residents never filed at all for an F2B preference visa for their now adult sons and daughters because the waiting times were too long. See generally Immigrant Waiting List by Country, *supra*. Other aged-out beneficiaries who would claim their parents' old priority dates are waiting in or would newly join the F1 line (for unmarried adult sons and daughters of U.S. citizens) or the F3 line (for married sons and daughters of U.S. citizens), see 8 U.S.C. 1153(a), because their parents originally qualified as lawful permanent residents but subsequently became naturalized citizens, see 8 U.S.C. 1154(k); 8 U.S.C. 1427(a); App., *infra*, 82a n.1.

The result would be that many aliens waiting in those lines would have their places in line pushed back. As the en banc dissent pointed out, changing priority dates is a "zero-sum game," App., *infra*, 35a; for every person who would be inserted closer to the front of the line as a result of the Ninth Circuit's decision, another person would be moved back. As of November 1, 2012, there were 288,705 F1 petitions, 486,597 F2B petitions, and 830,906 F3 petitions designated for consular processing overseas for which beneficiaries are awaiting visa numbers—many of which could be subject to reordering. See Immigrant Waiting List by Country, *supra*, at 2. Additional F1, F2B, and F3 petitions designated for processing in the United States (because their beneficiaries are already present in this country) would be subject to the same treatment.

Aliens pushed back in the line might see their waiting times increase substantially. Congress has made 226,000 family-sponsored visas available each year, of which only approximately 26,000 are F2B visas, and

has imposed additional per-country limits for each category. See 8 U.S.C. 1151-1153; see also 8 U.S.C. 1151(c) (explaining calculation governing available number of family-sponsored visas). Currently, for instance, visas are not available to Mexican nationals in the F2B category unless they have a priority date of November 22, 1992, or earlier. See U.S. Dept. of State, Visa Bulletin for Jan. 2013, http://travel.state.gov/visa/bulletin/ bulletin_5834.html (last visited Jan. 24, 2013). If a large number of Mexican nationals who now have priority dates after November 1992 were suddenly entitled to earlier priority dates under the Ninth Circuit's reading of Section 1153(h)(3) because they aged out under some earlier petition, then the cut-off date would retrogress in order to allow those persons to be processed without exceeding the yearly limit on F2B visas. That means that an alien outside the scope of Section 1153(h)(3) with a priority date of December 1992, whose priority date was about to become "current" and who has already been waiting for two decades, would have to wait an additional (and likely significant) amount of time.

There are undoubtedly inequities associated with such a reshuffling. See, *e.g.*, Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233-2236 (2012) (setting out an example in which application of the Ninth Circuit's interpretation would mean that A's son gets a visa number before B's son, even though B became a lawful permanent resident years earlier than A and filed a petition naming her son earlier than A did, and even though B and her son have been separated longer than A and her son have).

It is clear, moreover, that allowing aged-out beneficiaries to retain "original" priority dates indefinitely would represent a significant shift in immigration policy. See App., *infra*, 59a. Derivative beneficiaries who are under the age of 21 are entitled only to "accompany[]" or "follow[] to join" their parents, so that parents and minor children are not separated. 8 U.S.C. 1153(d); see *Santiago* v. *INS*, 526 F.2d 488, 491 (9th Cir. 1975) ("If Congress had wished to equate derivative preferences with actual preferences, the words 'accompanying, or following to join' would be absent from this statute."), cert. denied, 425 U.S. 971 (1976). The Ninth Circuit's ruling, however, treats aged-out derivative beneficiaries as if they were independently entitled to a preference based on their status as a grandchild, niece, or nephew of a U.S. citizen—relationships that do not fall into any existing family-preference category established by Congress. See App., *infra*, 34a-35a, 59a-60a.

In short, implementing the Ninth Circuit's ruling would likely create substantial disruptions to the administration of the visa system and the settled expectations of many aliens who are beneficiaries of approved visa petitions and have been waiting for a visa to become available. There is nothing that the relevant agencies could do to ameliorate that problem. In particular, the additional delay that many aliens would face would result from application of the strict statutory limits on the number of visas that are available each year, and not from any agency action (or inaction). This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS-APPELLANTS

v.

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS–APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

Filed: Sept. 26, 2012

OPINION

Before: ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, M. MARGARET MCKEOWN, KIM MCLANE WARDLAW, WILLIAM A. FLETCHER, RAYMOND C. FISHER, RONALD M. GOULD, RICHARD A. PAEZ, JOHNNIE B. RAWLINSON, MILAN D. SMITH, JR., and MARY H. MURGUIA, Circuit Judges.

Opinion by Judge MURGUIA; Dissent by Judge MILAN D. SMITH, JR.

MURGUIA, Circuit Judge, with whom PREGERSON, WARDLAW, FISHER, GOULD and PAEZ, Circuit Judges, join in full:

Appellants became lawful permanent residents and immigrated to the United States. However, due to visa quotas and a serious backlog, by the time Appellants received their family-sponsored visas, their children were no longer eligible to accompany them as recipients of derivative visas, which are available only to children under the age of twenty-one. Their children had "aged out" of eligibility.

The question before us is whether these children are entitled to relief under the Child Status Protection Act ("CSPA"), 8 U.S.C. § 1153(h). The CSPA provides, among other things, that when certain aged-out aliens apply for visas under a new category for adults, they may retain the filing date of the visa petition for which they were listed as derivative beneficiaries when they were children. This ensures that visas are

available quickly, rather than requiring the now-adult aliens to wait many more years in a new visa line.

The United States Citizen and Immigration Services ("USCIS") denied Appellants' requests for priority date retention under the CSPA. USCIS relied on the Board of Immigration Appeals' ("BIA") decision in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009) that the CSPA does not apply to all derivative beneficiaries. The district court, deferring to the BIA's interpretation, granted summary judgment to USCIS in two separate cases. We reverse.

We conclude that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries. The BIA's interpretation of the statute conflicts with the plain language of the CSPA, and it is not entitled to deference.

I. Family-based immigration overview

We begin with an overview of family-based immigration. Family-sponsored immigration allows U.S. citizens and lawful permanent residents ("LPRs") to file visa petitions on behalf of certain qualifying alien relatives. The Immigration and Nationality Act ("INA") limits the total number of family-sponsored immigrant visas issued each year to 480,000, and directs that natives of any single foreign state may not receive more than seven percent of these visas. 8 U.S.C. §§ 1151(c), 1152(a)(2). The INA also establishes preference categories based on the relationship between citizens or LPRs and their alien relatives, and limits the number of family-sponsored immigrant visas that can be granted to members of each preference

category. *Id.* § 1153(a). Unlike other types of family-sponsored visa applicants, children, spouses, and parents (i.e. "immediate relatives") of U.S. citizens are not subject to the annual visa limits. *Id.* § 1151(b)(2)(A)(i).

For non-immediate relatives of citizens, the INA establishes the following family visa preference categories:

> F1: Unmarried sons and daughters of U.S. citizens
>
> F2A: Spouses and children of LPRs
>
> F2B: Unmarried sons and daughters of LPRs
>
> F3: Married sons and married daughters of U.S. citizens
>
> F4: Brothers and sisters of U.S. citizens

Id. § 1153(a).

After a U.S. citizen or LPR files a visa petition on behalf of a relative, USCIS determines if a qualifying relationship exists between the citizen or LPR petitioner and the alien relative who is the primary beneficiary. If so, USCIS puts the beneficiary "in line" in the appropriate visa category. The beneficiary's place in line is determined by the date the petition is filed, which is known as the "priority date." Due to statutory limits for each visa category and a substantial backlog, it may be many years before a petition's priority date becomes "current," meaning that a visa is available for the beneficiary named in the petition. *See, e.g.*, U.S. Dep't of State, Visa Bulletin, August 2012, *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5749.html (showing delays for mem-

bers of all visa categories, including waits of over 10 years for nationals of several countries in certain categories).

A petition can also include the spouse or children of the primary beneficiary. The primary beneficiary's spouse or children may then receive derivative visas at the same time that the primary beneficiary receives a visa. 8 U.S.C. § 1153(d) ("A spouse or child . . . shall . . . be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent."). The INA defines a "child" as an unmarried person under the age of twenty-one. 8 U.S.C. § 1101(b)(1). The primary beneficiary's son or daughter can only receive a derivative visa if he or she is under twenty-one when the parent's priority date becomes current. Often children who qualify for derivative visas at the time a petition is filed on their parent's behalf are over the age of twenty-one by the time their parent receives the visa, and therefore may not immigrate to the United States with their parent. This is referred to as "aging out" of visa eligibility. Aging out also affects children who are the primary beneficiaries of F2A petitions, as they are no longer eligible for an F2A visa (for spouses and children of LPRs) once they turn twenty-one. Because some delays are many years long, children may age out even if they were very young when a petition was filed on their parent's behalf.

II. The Child Status Protection Act

In 2002, Congress passed the Child Status Protection Act ("CSPA"). Pub. L. No. 107–208, 116 Stat. 927 (2002). This appeal concerns a provision of the

CSPA entitled "Rules for determining whether certain aliens are children," codified at 8 U.S.C. § 1153(h).[1]

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[1] The CSPA states in relevant part:

(h) Rules for determining whether certain aliens are children

(1) In general

For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; o

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

Subsection (h) addresses two sources of delay that can cause a beneficiary to age out of child status: (1) USCIS processing delays and (2) the wait times between USCIS's approval of a visa petition and when a visa becomes available. Three parts of subsection (h) are relevant to our discussion.

The first paragraph of subsection (h) addresses the more minor delay that occurs while USCIS processes a visa application. 8 U.S.C. § 1153(h)(1). Subsection (h)(1) establishes the method to determine an alien's age "[f]or purposes of subsections (a)(2)(A) and (d) [of § 1153]," which respectively address F2A visas (for the children of LPRs), *id.* § 1153(a)(2)(A), and derivative visas (for the children of primary beneficiaries), *id.* § 1153(d). Subsection (h)(1) provides that for purposes of determining if a visa applicant qualifies as a child, the alien's "age" is his age on the date the visa becomes available minus "the number of days in the period during which the applicable petition" was pending after being filed. *Id.* § 1153(h)(1). Subsection (h)(1) thus ensures that an alien does not lose

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If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

"child" status due to administrative delays in the processing of his parent's visa petition.

Subsection (h)(2) defines the kinds of visa petitions to which the age-reduction formula in subsection (h)(1) applies. *Id.* § 1153(h)(2). Subsection (h)(2)(A) identifies F2A petitions, which are for children of LPRs. *Id.* § 1153(h)(2)(A). Subsection (h)(2)(B) identifies all other categories of visas for which a child may be a derivative beneficiary (family, employment, and diversity-based visa petitions). *Id.* § 1153(h)(2)(B).

Subsection (h)(3), the provision at issue in this appeal, grants alternative relief to aliens who are still determined to be twenty-one or older after calculating their age pursuant to the age reduction formula in subsection (h)(1). It states: "If the age of an alien is determined under [subsection (h)(1)] to be 21 years of age or older for the purposes of subsections (a)(2)(A) [children of LPRs] and (d) [derivative beneficiaries], the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). In other words, subsection (h)(3) requires that when aliens age out of child status for purposes of their original petition, their applications be automatically converted to the new appropriate category for adults. Additionally, it enables such aliens to retain the priority date assigned to their original petition. The effect of this older priority date is that the beneficiary is placed at or near the front of the visa line, and a visa would likely be available immediately or soon. Without this automatic conversion and priority date retention, the alien

will have to go to the back of the line for the new category, and might wait many more years for a visa.

The question presented in this appeal is whether the automatic conversion and date retention benefits provided by subsection (h)(3) apply only to aged-out F2A petition beneficiaries, or whether they also apply to derivative beneficiaries of the other family visa categories.

III. *Matter of Wang*

The BIA answered this question in *Matter of Wang*, 25 I. & N. Dec. 28 (2009). The BIA held that unlike subsections (h)(1) and (h)(2), "which when read in tandem clearly define the universe of petitions that qualify for the 'delayed processing formula,' the language of [subsection (h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* at 33. Based on this observation alone, the BIA found the statute ambiguous and turned to the Department of Homeland Security's past regulatory practice and the CSPA's legislative history. *Id.*

The BIA noted that "the phrase 'automatic conversion' has a recognized meaning" in immigration regulations. *Id.* at 34. According to the BIA, the term "conversion" has consistently meant that a visa petition converts from one visa category to another without the need to file a new petition, and priority date retention has always applied only to subsequent visa petitions filed by the same petitioner. *Id.* at 34-35. The BIA offered several examples. Under 8 C.F.R. § 204.2(i)(3), if an LPR petitioner becomes a citizen, his adult son or daughter's visa petition automatically

converts from an F2B petition (for adult sons and daughters of LPRs) to an F1 petition (for adult sons and daughters of citizens), and retains its original priority date. In this case, the identity of the petitioner remains the same. Additionally, 8 C.F.R. § 204.2(a)(4) allows an aged-out derivative beneficiary of an F2A spousal petition to retain his priority date as long as the original petitioner (his parent) submits an F2B visa petition on his behalf. Again, the petitioner remains the same. *Wang*, 25 I. & N. Dec. at 35. The BIA assumed that when Congress enacted subsection (h)(3), it understood past usage of these regulatory terms. *Id.*

The BIA also surveyed the legislative history of the CSPA and concluded that "there is no indication in the statutory language or legislative history of the CSPA that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line." *Id.* at 38. Finding no indication that Congress attempted to "expand on the historical application of automatic conversion and retention of priority dates for visa petitions," the BIA declined "to read such an expansion into the statute." *Id.*

Under the BIA's interpretation of subsection (h)(3), only subsequent visa petitions that do not require a change of petitioner may convert automatically to a new category and retain the original petition's priority date. Automatic conversion and priority date retention would thus be only available to F2A petition beneficiaries, including primary child beneficiaries and derivative beneficiaries of F2A spousal petitions. This is because these aged-out beneficiaries may be-

come primary beneficiaries of an F2B petition filed by the same petitioner.

IV. Factual background

Appellants' cases illustrate the question before us. Rosalina Cuellar de Osorio's citizen mother filed a petition for an F3 visa (for a married daughter of a citizen) on her behalf in May 1998. Cuellar de Osorio's son, who was then thirteen, was listed on the petition as a derivative beneficiary. Cuellar de Osorio's visa was approved in June 1998, but her priority date did not become current until November 2005. By then, her son was twenty-one and as a result was ineligible for a derivative visa. Cuellar de Osorio became an LPR and immigrated to the United States in August 2006. In July 2007, Cuellar de Osorio filed an F2B petition for her son, now the adult son of an LPR, and requested that he retain the May 1998 priority date of her original F3 petition in which he had been named a derivative beneficiary. USCIS did not grant priority date retention, so Cuellar de Osorio's son was placed in the back of the F2B line, requiring him to wait several more years for a visa. Cuellar de Osorio and several other similarly situated petitioners sued USCIS. Deferring to the BIA's decision in *Matter of Wang*, under which the plaintiffs were not entitled to automatic conversion and priority date retention, the district court granted summary judgment to USCIS.

Teresita Costelo was the beneficiary of an F3 visa petition filed by her citizen mother in January 1990. Costelo's two daughters, then aged ten and thirteen, were listed as derivative beneficiaries. By the time Costelo received her visa in 2004, both daughters were

over twenty-one. Costelo immigrated and became an LPR, filed F2B petitions for her daughters, and requested retention of the 1990 priority date of the prior F3 visa petition.

Lorenzo Ong's citizen sister filed an F4 petition on his behalf in 1981. At the time, Ong's daughters were ages two and four. By the time Ong's priority date became current in 2002, his daughters had aged out of derivative visa eligibility. Ong became an LPR and, in March 2005, he filed F2B petitions on behalf of his adult daughters and later requested retention of the 1981 priority date. USCIS did not respond to the priority date request. Costelo and Ong sued. The district court certified a class and granted the Government's motion for summary judgment, again deferring to *Matter of Wang*.

V. Second and Fifth Circuit decisions

Since the BIA decided *Matter of Wang*, two of our sister circuits have considered subsection (h)(3). Though the Second and Fifth Circuits reached different conclusions as to the scope of subsection (h)(3)'s applicability, neither found the language of the CSPA ambiguous and therefore neither deferred to *Matter of Wang*. *See Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011); *Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011).

The Fifth Circuit concluded that the unambiguous language of the CSPA extends automatic conversion and priority date retention to both F2A beneficiaries and aged-out derivative beneficiaries of other family-sponsored petitions. *Khalid*, 655 F.3d at 374-75. The Fifth Circuit held that because subsection (h)(2) explicitly encompasses both F2A visas and

all derivative visas, and subsections (h)(1), (h)(2), and (h)(3) are interdependent, "the statute, as a whole, clearly expresses Congress' intention about the universe of petitions covered by (h)(3)," and "there is no room for the agency to impose its own answer to the question." *Id.* at 371 (internal quotation marks omitted). The Fifth Circuit thus declined to defer to the BIA's interpretation of subsection (h)(3), instead holding that automatic conversion is available for derivative beneficiaries of all family petitions, even when this necessitates a change in the identity of the petitioner.

In contrast, the Second Circuit held that an aged-out derivative beneficiary of an F2B petition was not entitled to automatic conversion and priority date retention when his mother filed an F2B petition that named him as a primary beneficiary. *Li*, 654 F.3d at 383. The Second Circuit concluded that the appellant's petition could not be automatically converted because "the phrase conversion to an appropriate category refers to a petition in which the category is changed, but not the petitioner." *Id.* at 384. According to the Second Circuit, a change in the petitioner forecloses the possibility of automatic conversion.

VI. Standard of Review

We review de novo a district court's grant of summary judgment. *Herrera v. U.S. Citizenship & Immigration Servs.*, 571 F.3d 881, 885 (9th Cir. 2009). We review the BIA's precedential decision interpreting a governing statute according to the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.

2d 694 (1984). *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999). Pursuant to the *Chevron* two-step analysis, we first ask if the statute is unambiguous as to the question at issue. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778. If it is, that is the end of our inquiry. *Id.* Only if the statute is ambiguous do we proceed to step two and ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778.

VII. Discussion

We begin by determining whether the CSPA is unambiguous as to whether the priority date retention and automatic conversion benefits in subsection (h)(3) extend to aged-out derivative beneficiaries of all family visa petitions. To determine if Congress has spoken unambiguously, we begin with the plain language of the statute itself. *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 772-73 (9th Cir. 2011).

Subsection (h)(3) states: "Retention of priority date. If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3).

The Government argues that the language of subsection (h)(3) is ambiguous because, as the BIA held, it does not specify the petitions that qualify for automatic conversion and retention of priority dates. *See Wang*, 25 I. & N. Dec. at 33 (subsection (h)(3) "does

not expressly state which petitions qualify for automatic conversion and retention of priority dates"). The Government is correct that subsection (h)(3) itself does not identify the kinds of visa petitions to which it applies, through either its own terms or by explicit reference to another definitional section. In contrast, subsection (h)(1), which establishes the age-reduction formula, states that it applies to the categories of visas named in subsection (h)(2). 8 U.S.C. § 1153(h)(1). In turn, subsection (h)(2) identifies both F2A beneficiaries (children of LPRs) and child derivative beneficiaries of all other visa categories. *Id.* § 1153(h)(2).

However, we do not assess subsection (h)(3) in a vacuum, but rather consider the text in its statutory context. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000). The effect of subsection (h)(3) is explicitly contingent upon the operation of subsection (h)(1). The first words of subsection (h)(3) read "[i]f the age of an alien is determined under [subsection (h)(1)] to be 21 years of age or older," then the alien's petition will be automatically converted to the appropriate category and he will retain the original priority date. 8 U.S.C. § 1153(h)(3). By subsection (h)(3)'s own terms, then, an alien is entitled to automatic conversion and priority date retention under subsection (h)(3) only if he is determined to be over twenty-one after applying the reduction calculation in subsection (h)(1). *Id.*; *see also Khalid*, 655 F.3d at 370 ("The benefits of automatic conversion and priority date retention are explicitly conditioned on a particular outcome from the formula in (h)(1) . . . .").

Subsection (h)(3) thus cannot function independently; it is triggered only when an application of subsection (h)(1)'s subtraction formula determines that the alien is over twenty-one. In turn, subsection (h)(1) explicitly applies to the visas described in subsection (h)(2), which include both F2A visas and derivatives of the other visa categories. Therefore, both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries may automatically convert to a new appropriate category (if one is available), and the visa applicants may retain the priority date of the original petitions for which they were named beneficiaries. The plain language of the statute thus conclusively resolves the question before us.

Our interpretation is further bolstered by Congress's use of the identical phrase "for [the] purposes of subsections (a)(2)(A) and (d)" in both subsections (h)(1) and (h)(3). This phrase refers to both F2A petitions for children (established by 8 U.S.C. § 1153(a)(2)(A)) and derivative visas for the children of primary beneficiaries of all visa categories (established by 8 U.S.C. § 1153(d)). It is undisputed that subsection (h)(1) applies to all derivative beneficiaries, and to accord a different meaning to the phrase as used in subsection (h)(3) violates the "presumption that a given term is used to mean the same thing throughout a statut." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994). We therefore read Congress's repeated references to "subsections (a)(2)(A) and (d)" as expressions of its intent to extend automatic conversion and priority date retention to all family-sponsored derivative beneficiaries.

The existence of a circuit split does not itself establish ambiguity in the text of the CSPA. *See, e.g.*, *Roberts v. Sea–Land Servs., Inc.*, — U.S. —, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012) (holding that § 906(c) of the Longshore and Harbor Workers' Compensation Act is unambiguous notwithstanding disagreement between the Fifth, Ninth, and Eleventh Circuits about its meaning); *Mohamad v. Palestinian Auth.*, — U.S. —, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012) (holding that the term "individual" as used in the Torture Victim Protection Act unambiguously encompasses only natural persons despite disagreement among several Circuits); *see also Reno v. Koray*, 515 U.S. 50, 64-65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) ("A statute is not 'ambiguous for purposes of lenity merely because' there is 'a division of judicial authority' over its proper construction.") (quoting *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)). Like the Fifth Circuit, we recognize that the Second Circuit concluded that a petition cannot be automatically converted where a change in petitioner is required, and we respectfully disagree. *See Khalid*, 655 F.3d at 373 (citing *Li*, 654 F.3d at 383). The Second Circuit's decision not to consider the interrelatedness of sections (h)(1), (h)(2) and (h)(3) does not undermine our conclusion that the statute, read as a whole, unambiguously answers the question before us.

The Government also contends the CSPA becomes ambiguous when its terms are applied to certain derivative beneficiaries. According to the Government, automatic conversion and priority date retention cannot be practicably applied to F3 and F4 derivative beneficiaries because, for a category conversion to be automatic, it must involve the same petition and the

same petitioner. Under this definition, automatic conversion would not be possible for aged-out derivative beneficiaries of F3 and F4 petitions because there is no qualifying relationship between the original visa petitioner and the aged-out beneficiary.

For an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner. In the case of an F3 petition, the derivative beneficiary's adult parent is the primary beneficiary, and the derivative beneficiary's U.S. citizen grandparent is the petitioner. Once the derivative beneficiary turns twenty-one, he has no qualifying relationship with the original petitioner because a U.S. citizen cannot petition on behalf of his adult grandchild. For an F4 petition, the petitioner is a U.S. citizen, the primary beneficiary is the brother or sister of the citizen, and the derivative beneficiary is the child of the primary beneficiary and the niece or nephew of the petitioner. After the derivative beneficiary turns twenty-one, there is no qualifying relationship between a citizen uncle and his adult nephew. When the parents of aged-out derivative beneficiaries of F3 or F4 petitioners receive their visas and attain LPR status, they can file F2B petitions naming their now-adult sons and daughters as primary beneficiaries. In these F2B petitions, the identity of the petitioner changes from the beneficiary's grandparent or aunt or uncle to his or her parent.[2]

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[2] For example, U.S. citizen Adele files an F3 petition on behalf of her adult son Aron, and includes Aron's daughter Naira as a derivative beneficiary. By the time Aron receives a visa, Naira is over

The plain language of a statute controls except when "its application leads to unreasonable or impracticable results." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (internal quotation marks omitted). The language of the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant. We do not find the fact that an automatically-converted visa petition may entail a new petitioner to be the kind of "rare and exceptional circumstance[]" that renders the plain meaning of a statute impracticable. *Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Plainly, a change in policy announced by the statute's plain language cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented. *Id.* A statute that

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twenty-one. Adele can no longer petition on Naira's behalf, as there is no qualifying relationship between a grandmother and her adult granddaughter. Once Aron becomes an LPR, Aron may file an F2B petition for his daughter Naira.

Similarly, U.S. citizen Adele files an F4 petition for her sister Kristen, and includes Kristen's daughter Sandy as a derivative beneficiary. If Sandy is over twenty-one when Kristen receives her visa, Adele cannot petition for Sandy, because Adele cannot petition for her adult niece. Kristen may file an F2B petition for her daughter Sandy.

The question here is whether the original F3 or F4 petition should be automatically converted to an F2B petition, and if the F2B petition retains the priority date of the F3 or F4 petition.

requires an agency to change its existing practices does not necessarily "lead to absurd or impracticable consequences." *Seattle-First Nat'l Bank v. Conaway*, 98 F.3d 1195, 1197 (9th Cir. 1996) (internal quotation marks omitted). We have no doubt that USCIS can develop a process for the F3 and F4 petitions of aged-out derivative beneficiaries to be automatically converted to F2B petitions, with new petitioners and new beneficiaries. The plain meaning of the CSPA controls.

In fact, the CSPA drafters seem to have contemplated that automatic conversion could require more than just a change in visa category. Subsection (h)(3) states that an alien's petition is automatically converted and retains the date of the "original petition." 8 U.S.C. § 1153(h)(3). This reference to an "original petition" suggests the possibility of a new petition, obtained either by editing the original petition or "automatically" requesting a new petition that identifies a new petitioner and primary beneficiary.[3]

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[3] The "original petition" clause also contradicts the dissent's assertion that § 1153(h)(3) is ambiguous because an F2B petition for an aged-out F3 or F4 derivative beneficiary could entail a new petition and petitioner. Dissent at 1017-19. The CSPA provides that a petition is to be automatically converted and is to "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). Therefore, notwithstanding the use of the word "conversion" in other parts of the INA, the CSPA expressly recognizes the possibility of automatic conversion of a subsequent petition. A new petition is not a "problem" in the plain meaning of the statute that renders the language ambiguous. *See* Dissent at 1019.

Any alleged impracticability is further undermined by the reality that when an F2A petition is converted to an F2B petition for an aged-out beneficiary—the kind of change to which all parties agree subsection (h)(3) applies—USCIS must take some action to effectuate the change. And where a derivative beneficiary of an F2A petition ages out and requires a new F2B petition naming him as the primary beneficiary, the agency must change both the visa category and the identity of the primary beneficiary. These changes, which USCIS is apparently capable of handling, do not seem significantly less onerous or complicated than a visa conversion which entails a new petitioner.

We are also not convinced that any delay between the date a visa becomes available to the parent of an aged-out derivative beneficiary and the time when the parent obtains LPR status and can file an F2B petition renders automatic conversion impracticable. Until the parent of the aged-out son or daughter becomes an LPR, there is no category to which a petition for the son or daughter can immediately convert.[4] It is also true that if the parent's visa is ultimately denied, there will be no category to which his aged-out son or daughter can convert. The lag time while a parent receives his visa and adjusts status, or the possibility

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[4] For a derivative beneficiary, the benefits of § 1153(h) are triggered on "the date on which an immigrant visa number became available for the alien's parent." 8 U.S.C. § 1153(h)(1)(A). Some time will elapse between the date a visa is available to the parent and the date the visa is approved (entitling the parent may file an F2B petition for the adult son or daughter).

that conversion for an aged-out derivative is never possible, present administrative complexities that may inform USCIS's implementation of the CSPA. But these unresolved procedural questions do not create ambiguity in the text or result in a visa system "'so bizarre that Congress could not have intended' it." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 347, 114 S. Ct. 843, 127 L. Ed. 2d 165 (1994) (quoting *Demarest*, 498 U.S. at 191, 111 S. Ct. 599). Therefore, the plain language of the CSPA is not impracticable. It is the agency's task to resolve these complications, not the court's.

Moreover, the Government's restrictive interpretation of subsection (h)(3) barely modifies the regulatory regime that existed at the time the CSPA was enacted. According to the Government, the CSPA makes priority date retention and automatic conversion available only to primary and derivative beneficiaries of F2A petitions. However, under 8 C.F.R. § 204.2(a)(4), which pre-dated the CSPA, an LPR is entitled to file an F2B petition on behalf of an aged-out son or daughter and retain the original priority date from the LPR's original F2A petition. For such aliens, the only benefit of the CSPA over the current regulatory rule under the Government's reading is automatic conversion, as the regulation requires that the LPR parent file a new F2B petition on behalf of his or her son or daughter to qualify for priority date retention. Thus, under the Government's interpretation, subsection (h)(3)'s only effects are to extend automatic conversion and priority date retention to aged-out primary beneficiaries of F2A visa petitions, and automatic conversion to F2A derivative beneficiaries. Like the Fifth Circuit, "[w]e are skeptical that this meager

benefit was all Congress meant to accomplish through subsection (h)(3), especially where nothing in the statute singles out derivative beneficiaries of second-preference petitions for special treatment." *Khalid*, 655 F.3d at 374.

Additionally, 8 C.F.R. § 204.2(a)(4) explicitly requires that to qualify for priority date retention, the identity of the petitioner must remain the same, while the CSPA contains no such requirement. If Congress intended to limit automatic conversion to only subsequent petitions in which the petitioner remains the same, the regulations provided a clear example of the language it could have used. Congress's decision not to track the regulatory language further suggests that the CSPA is not merely a codification of regulatory practice. *See id.* at 374 n.9 (citing 8 C.F.R. § 204.2(a)(4)).

The parties and amici disagree about how our interpretation will affect different categories of visa petitioners and about which aliens most deserve the next available visas. The number of visas available is statutorily fixed and is far exceeded by demand. Accordingly, Congress's decision to allow aged-out beneficiaries to retain their priority dates when they join new preference category lines will necessarily impact the wait time for other aliens in the same line. It is difficult to assess the equities of this result, but that is not our role. We "are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, — U.S. —, 132 S. Ct. 2566, 2579, 183 L. Ed. 2d 450 (2012).

The CSPA, "as a whole, clearly expresses Congress' intention," and we therefore do not defer to the BIA's interpretation of subsection (h)(3). *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42, 110 S. Ct. 929, 108 L. Ed. 2d 23 (1990); *see also Khalid*, 655 F.3d at 371 (the CSPA "as a whole, clearly expresses Congress' intention about the universe of petitions covered by (h)(3)," and "there is no room for the agency to impose its own answer to the question" (internal quotation marks omitted)). Automatic conversion and priority date retention are available to all visa petitions identified in subsection (h)(2). Because "the intent of Congress is clear, that is the end of the matter," *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778, and we do not consider past agency practice or legislative history. We join the Fifth Circuit in "giv[ing] effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S. Ct. 2778.

The district court's grants of summary judgment are reversed and these cases are remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, and MCKEOWN, W. FLETCHER and RAWLINSON, Circuit Judges, join, dissenting:

The statutory provision at issue in this case, 8 U.S.C. § 1153(h), "is far from a model of clarity." *Robles-Tenorio v. Holder*, 444 Fed. Appx. 646, 649 (4th Cir. 2011). The Second Circuit recently held that § 1153(h)(3) means the exact opposite of what the majority holds. *See Li v. Renaud*, 654 F.3d 376, 382-83 (2d Cir. 2011). Other courts, including the

original three-judge panel in this case, concluded that § 1153(h)(3) is ambiguous, and that the Board of Immigration Appeals's (BIA) decision is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See, e.g., Cuellar de Osorio v. Mayorkas*, 656 F.3d 954, 965-66 (9th Cir. 2011), *vacated*, 677 F.3d 921 (9th Cir. 2012); *Zhong v. Novak*, No. 08-4597, 2010 WL 3302962, at *7-9 (D.N.J. Aug. 18, 2010); *Co v. U.S. Citizenship & Immigration Serv.*, No. CV 09-776-MO, 2010 WL 1742538, at *4 (D. Or. Apr. 23, 2010); *cf. Robles-Tenorio*, 444 Fed. Appx. at 649 ("It is unclear whether the text and structure of (h)(1) and (h)(3) can be reconciled in any coherent or reasonable fashion."). If the meaning of § 1153(h)(3) were truly as clear and unmistakable as the majority holds, it certainly has eluded more than its share of reasonable jurists.[1]

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[1] I do not state or imply that a circuit split is evidence that a statute is ambiguous, although the Supreme Court has stated that "contrasting positions of the respective parties and their *amici*" may demonstrate that a statute "do[es] embrace some ambiguities." *Dewsnup v. Timm*, 502 U.S. 410, 416, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) ("In light of the two dissents from the opinion of the Supreme Court of California, and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here.") (internal citations omitted).

Of course, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context

I would hold that 8 U.S.C. § 1153(h)(3) is ambiguous because it contains language simultaneously including and excluding derivative beneficiaries of F3 and F4 visa petitions from the benefits of the Child Status Protection Act (the CSPA), 8 U.S.C. § 1153(h). Because Congress did not "speak[ ] with the precision necessary to say definitively whether [the statute] applies to" F3 and F4 derivative beneficiaries, I would proceed to *Chevron* step two. *Mayo Found. for Med. Educ. & Research v. United States*, — U.S. —, 131 S. Ct. 704, 711, 178 L. Ed. 2d 588 (2011) (first alteration added, second alteration in original, and citation omitted). At step two, I would defer to the BIA's interpretation of § 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (2009). Because the majority holds otherwise, I respectfully dissent.

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in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). I merely point out the common sense proposition that if the intent of Congress were truly clear, it would be surprising that so many courts misread the statute. Nevertheless, it is worth noting that there is currently a circuit split over whether the existence of a circuit split is evidence of statutory ambiguity. *Compare Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 419-20 (2d Cir. 2009) (evidence), *vacated on other grounds*, — U.S. —, 130 S. Ct. 3498, 177 L. Ed. 2d 1085 (2010), *McCreary v. Offner*, 172 F.3d 76, 82-83 (D.C. Cir. 1999) (same), *and In re S. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998) (same), *with Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 n.4 (11th Cir. 2003) (not evidence), *aff'd*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005), *and Rosmer v. Pfizer Inc.*, 263 F.3d 110, 118 (4th Cir. 2001) (same).

I. *Chevron* Step One

At *Chevron* step one, "we ask whether the statute's plain terms 'directly addres[s] the precise question at issue.'" *Nat'l Cable & TelecommS. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (quoting *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778) (alteration in original). "If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" *Id.* (quoting *Chevron*, 467 U.S. at 845, 104 S. Ct. 2778). Thus, the relevant question at the first step of *Chevron* is whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842, 104 S. Ct. 2778. Unless the statute's plain text "speak[s] with the precision necessary to say definitively whether [the statute] applies to" a particular class of individuals, the statute is ambiguous. *Mayo Found.*, 131 S. Ct. at 711 (alteration in original). Typically, such an ambiguity "lead[s] . . . inexorably to *Chevron* step two." *Id.*

Section 1153(h)(3) states: "If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). The crux of the appeal is whether F3 and F4 derivative beneficiaries are entitled to the benefits provided in this provision.

Many reasonable constructions of § 1153(h)(3) are possible. One could reasonably read § 1153(h)(3), as the majority does, to include F3 and F4 derivative

beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2). But three limitations in § 1153(h)(3) complicate matters: (1) that a petition must be converted "to the appropriate category;" (2) that only "the alien's petition" may be converted; and (3) that the conversion process has to occur "automatically." *See* 8 U.S.C. § 1153(h)(3). By ignoring statutory language contrary to its interpretation before finding the plain meaning clear, the majority not only misconstrues its role at *Chevron* step one, but it also runs afoul of Supreme Court precedent controlling how courts are supposed to interpret statutes. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007) ("In making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'") (citation omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted).

One could reasonably construe § 1153(h)(3) as excluding aged-out F3 and F4 derivative beneficiaries. This provision requires conversion "to the appropriate category." 8 U.S.C. § 1153(h)(3). Section 1153(a) identifies the only categories for which a family-preference petition may be filed: (1) "[u]nmarried sons and daughters of citizens;" (2) "[s]pouses and unmarried sons and unmarried daughters of permanent resident aliens;" (3) "[m]arried sons and married daugh-

ters of citizens;" and (4) "[b]rothers and sisters of citizens." *Id.* § 1153(a)(1)-(4). The children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own. This led the Second Circuit to conclude that Congress did not intend to provide them the benefits of automatic conversion and retention of their original priority dates: "Because there is no family preference category for grandchildren of [lawful permanent residents], and Cen has not specified a category that would be appropriate, Cen cannot be converted to an 'appropriate category' *with respect to his grandfather's petition.* Therefore, Cen is not eligible under Section 1153(h)(3) to retain the 1994 priority date of his grandfather's petition." *Li*, 654 F.3d at 385 (emphasis added). We should do the same.

Second, § 1153(h)(3) requires "the alien's petition" to be automatically converted. 8 U.S.C. § 1153(h)(3). As the majority concedes, conversion of F3 and F4 derivative beneficiaries to the F2B category requires "a subsequent petition" and "a new petitioner" because "the identity of the petitioner changes from the beneficiary's grandparent or aunt or uncle to his parent." *See id.* § 1153(a)(2)(B). But "a subsequent petition" is not the alien's original petition. Because the alien's original petition cannot be converted, as § 1153(h)(3) requires, and, instead, an entirely new petition must be

filed, one could also reasonably conclude that Congress did not intend to cover F3 and F4 derivative beneficiaries in § 1153(h)(3).[2] *See Li*, 654 F.3d at 384 (implying that § 1153(h)(3) does not apply where "a different family-sponsored petition by a different petitioner" is required).

Third, § 1153(h)(3) mandates that the conversion process occur "automatically." 8 U.S.C. § 1153(h)(3). The majority correctly recognizes that "[w]hen the parents of aged-out derivative beneficiaries of F3 or F4 petitioners receive their visas and attain [lawful permanent resident] status, they can file F2B petitions naming their now-adult sons and daughters as primary beneficiaries." *See id.* § 1153(a)(2)(B). An action cannot be "automatic" if it depends on what a person *can* or *may* do, not what he or she definitely *will* do. A process is "automatic" if it is "self-acting or self-regulating," or occurs "without thought or conscious intention." *Webster's Third New International Dictionary* 148 (2002). As the original panel in this case concluded, "The phrase 'the alien's petition shall automatically be converted to the appropriate category,' 8 U.S.C. § 1153(h)(3), suggests that the *same* petition, filed by the *same* petitioner for the *same* beneficiary,

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[2] Contrary to the majority opinion, the statute does not "expressly recognize[] the possibility of automatic conversion of a subsequent petition." As the Second Circuit noted, "[e]ach time the Act uses the word 'conversion' it describes a change—*without need for an additional petition*—from one classification to another, not from one person's family-sponsored petition to another." *Li*, 654 F.3d at 384 (emphasis added).

converts to a new category. This understanding comports with the ordinary meaning of the word 'automatic,' which implies that the conversion should happen without any outside input, such as a new petitioner." *Cuellar de Osorio v. Mayorkas*, 656 F.3d 954, 962 (9th Cir. 2011), *withdrawn by* 677 F.3d 921, 921-22 (9th Cir. 2012).

The majority's reading of § 1153(h)(3) thus strains the ordinary meaning of the word "automatically," essentially reading this limitation on which petitions may be converted out of the statute. This is not a sound approach to statutory interpretation. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 95 L. Ed. 566 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

The majority recognizes the problem that an F2B petition requires an entirely new petition and petitioner, but it only considers this issue in the course of determining whether the statutory scheme set up by Congress is impracticable. In my view, the need to file a new petition does not go to whether the statutory scheme is impracticable and thus should be excepted from the plain meaning rule. It goes to whether the plain meaning of § 1153(h)(3) is ambiguous. The majority disregards the lack of any appropriate cate-

gory to which derivative beneficiaries of F3 and F4 petitions can be converted before finding the plain language clear. In doing so, the majority overlooks highly relevant evidence from the overall statutory scheme that Congress did not intend for these individuals to receive the benefits identified in § 1153(h)(3). *See Brown & Williamson*, 529 U.S. at 132-33, 120 S. Ct. 1291 (stating that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" and should consider how statutory language fits into "the overall statutory scheme") (citation omitted). It forgets that "[i]n ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988).

Section 1153(h)(3) is also unclear about whether aged-out derivative beneficiaries are entitled to retain their original priority dates. Importantly, § 1153(h)(3) ties automatic conversion and retention of an original priority date together by specifying that an eligible alien's petition "shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3) (emphasis added). "[T]he Supreme Court has said that 'and' presumptively should be read in its 'ordinary' conjunctive sense unless the 'context' in which the term is used or 'other provisions of the statute' dictate a contrary interpretation." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 589 (6th Cir. 2005) (listing cases); *see also Bruesewitz v. Wyeth LLC*, — U.S. —, 131 S. Ct. 1068, 1078, 179 L. Ed. 2d 1 (2011) (noting that "linking in-

dependent ideas is the job of a coordinating junction like 'and'"). Nothing in the statute suggests that Congress meant for the word "and" to be read as "or." Since the word "and" ties the two benefits together, the ambiguity about the availability of automatic conversion to F3 and F4 derivative beneficiaries also renders the statute ambiguous as to whether such beneficiaries are entitled to retention of their original priority dates. *See Li*, 654 F.3d at 383-84 (rejecting the argument that the two benefits are distinct and independent).

Accordingly, I would hold that it is unclear whether Congress intended for aged-out F3 and F4 derivative beneficiaries to enjoy automatic conversion to a new category and retention of their priority dates. Section 1153(h)(3) appears to give contradictory answers to this question. Because this provision's plain terms do not yield a clear and consistent answer, I would proceed to *Chevron* step two.

II. *Chevron* Step Two

"The sole question for the Court at step two under the *Chevron* analysis is 'whether the agency's answer is based on a permissible construction of the statute.'" *Mayo Found.*, 131 S. Ct. at 712 (quoting *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980, 125 S. Ct. 2688. The BIA's interpretations of the INA are entitled to *Chevron* deference.

See Negusie v. Holder, 555 U.S. 511, 517, 129 S. Ct. 1159, 173 L. Ed. 2d 20 (2009).

The BIA interpreted § 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. at 33-39, holding that automatic conversion and priority date retention are not available where there is no category to which a beneficiary's petition can be converted, and a new petition would have to be filed by a new petitioner. *See id.* at 38-39; *see also id.* at 35 (explaining how "conversion" and "retention" have traditionally been interpreted). Thus, the BIA held that an aged-out derivative beneficiary of an F4 petition was not entitled to automatic conversion to a new category and retention of her original priority date when her father subsequently filed an F2 petition on her behalf. *See id.* at 38-39.

I would hold that the BIA's interpretation of § 1153(h)(3) is reasonable. As discussed above, there is no appropriate category to which derivative beneficiaries of F3 and F4 petitions may be converted if they age out because a petition may not be filed on behalf of a United States citizen's niece, nephew, or grandchild. No such family-preference categories exist. As the BIA recognized, there is "no clear indication in the statute that Congress intended to expand the historical categories eligible for automatic conversion and priority date retention . . . . " *Id.* at 36. The legislative history of the CSPA is also unclear about whether Congress intended for aged-out F3 and F4 derivative beneficiaries to receive the benefits of § 1153(h)(3). *See id.* at 36-38. Policy considerations also counsel deference to the BIA's interpretation of the statute. Congress caps the number of visas available to aliens in each preference category, and the

demand for such visas far outstrips the supply. *See* 8 U.S.C. § 1151(c); *Matter of Wang*, 25 I. & N. Dec. at 38. Reading section 1153(h)(3) as the majority does will not permit more aliens to enter the country or keep more families together, but will simply shuffle the order in which individual aliens get to immigrate. If F3 and F4 derivative beneficiaries can retain their parents' priority date, they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship. As the BIA recognized, Congress could not have intended this zero-sum game. *See Matter of Wang*, 25 I. & N. Dec. at 36-38. I would defer to the agency's reasonable construction of the statute at *Chevron* step two. *See Brand X*, 545 U.S. at 980, 125 S. Ct. 2688.

III. Conclusion

I would hold that § 1153(h)(3) is ambiguous about whether aged-out F3 and F4 derivative beneficiaries are within its ambit, and that the BIA's conclusion that they are not is reasonable. I believe that the BIA's construction of this provision is entitled to deference. *See Mayo Found.*, 131 S. Ct. at 712; *Brand X*, 545 U.S. at 980, 125 S. Ct. 2688. Accordingly, I would affirm the district court.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS-APPELLANTS,

v.

ALEJANDRO KAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS-APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS-APPELLEES

Filed: Sept. 2, 2011
Argued and Submitted: July 15, 2011

Appeal from the United States District Court for the Central District of California, James V. Selna, District Judge, Presiding.
D.C. Nos. 5:08-cv-00840-JVS-SH, 8:08-cv-00688-JVS-SH.

OPINION

Before: PAMELA ANN RYMER, RICHARD C. TALLMAN, AND SANDRA S. IKUTA, Circuit Judges

TALLMAN, Circuit Judge:

This case involves parents who face separation from their children due to the way our immigration system operates. Appellants, the parents, have all immigrated to the United States and become lawful permanent residents. Their children, however, have not been able to join them because the children are no longer under the age of 21.

Appellants became lawful permanent residents through the family-sponsored immigration process, which allows certain aliens to immigrate based on their status as relatives of either U.S. citizens or lawful permanent residents. When Appellants began this process, they all had children under the age of 21 who would have been eligible to immigrate with them under the Immigration and Nationality Act (INA). *See* 8 U.S.C. §§ 1101(b)(1), 1153(d) (entitling a child under the age of 21 to the same immigration status as a parent). However, due to years-long delays associated

with the family-sponsored immigration process, these children turned 21 before their parents were able to immigrate or adjust status. Because these children had "aged out" of child status under the INA by the time their parents immigrated or adjusted status, they were no longer eligible to accompany their parents.

The question we are faced with today is whether Appellants' children are entitled to any relief under the Child Status Protection Act (CSPA), 8 U.S.C. § 1153(h), which was enacted to help keep families together by expediting the immigration process for certain aged-out aliens. United States Citizenship and Immigration Services (CIS) denied Appellants' requests for relief under the CSPA, and Appellants challenge the denial as arbitrary and capricious. The district court, deferring to the Board of Immigration Appeals' (BIA) interpretation of § 1153(h), held that the CSPA did not apply to Appellants' children. Because we agree that the BIA's interpretation of § 1153(h) warrants deference, we affirm the district court's grant of summary judgment in favor of CIS. We hold that Appellants' children are not among the aged-out aliens entitled to relief under § 1153(h).

I

Understanding this appeal requires familiarity with the family-sponsored immigration process and, specifically, the complicated family preference system. Family-sponsored immigration is one of the primary avenues by which an alien can obtain lawful permanent residence in the United States, along with employment-based immigration, diversity-based immigration, and asylum. The family-sponsored immigration process allows a U.S. citizen or lawful permanent resident

(LPR) to file a form I-130 immigration petition on behalf of an alien relative. 8 U.S.C. § 1153(a). After the petition is filed, CIS determines if it establishes a qualifying relationship between the citizen or LPR petitioner and the alien relative beneficiary. Because there is no annual cap on the number of permanent resident visas (also known as "green cards") available to immediate relatives of U.S. citizens, a citizen's spouse, child under the age of 21, or parent can apply for one immediately.

For other qualifying relatives of citizens and for qualifying relatives of LPRs, the number of visas available annually is capped. *Id.* § 1151(c). To allocate these visas, the INA establishes the following preference system:

> Aliens subject to the worldwide [numerical limitation] for family-sponsored immigrants shall be allotted visas as follows:
>
> (1) Unmarried sons and daughters [age 21 or older] of citizens
>
> Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens
>
> Qualified immigrants—
>
> (A) who are the spouses or children [under 21] of an alien lawfully admitted for permanent residence, or

> (B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,
>
> shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (3) Married sons and married daughters of citizens
>
> Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed [numerical quota formula].
>
> (4) Brothers and sisters of citizens
>
> Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed [numerical quota formula].

Id. § 1153(a). If an I-130 petition establishes one of these qualifying relationships, CIS approves it and places the alien beneficiary "in line" in the appropriate preference category. These family preference categories are referred to as F1, F2A, F2B, F3, or F4, corresponding to § 1153(a)'s numbered paragraphs.

Because annual demand for family preference visas exceeds the statutory cap in all categories, a beneficiary may wait years before a visa becomes available, with some categories having longer wait times than others. The beneficiary's place in line is determined by the date the petition was filed, which is known as the "priority date." Every month, the State Department publishes a visa bulletin with updated "cut off dates" for each family preference category. When

the cut-off date is later than the beneficiary's priority date, the priority date is "current," and a lawful permanent resident visa is then available for the beneficiary. In order to obtain the visa and become an LPR, however, the beneficiary must act within one year of notification of visa availability to complete consular processing (if abroad) or apply for an adjustment of status (if present in the United States).

Under the INA, a beneficiary's spouse or child is deemed a "derivative" beneficiary entitled to the same immigration status and priority date as the primary beneficiary:

> A spouse or child . . . shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a) . . . of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

8 U.S.C. § 1153(d). Importantly, to be considered a "child," a person must be unmarried and under the age of 21. *Id.* § 1101(b)(1). Due to the long wait times often associated with family preference visas, some aliens who begin the process eligible to immigrate as a child—either as the primary beneficiary of an F2A petition or as a derivative beneficiary of a petition for a parent in any of the other family preference categories—will "age out" of eligibility by turning 21 before a visa becomes available.

In 2002, Congress enacted the CSPA to provide relief to "aged out" alien children by allowing them either to maintain "child" status longer, *see* 8 U.S.C. § 1153(h)(1), or to automatically convert to a valid

adult visa category while retaining the priority date associated with their original petition, *see id.* § 1153(h)(3). The issue before us is whether an aged-out derivative beneficiary of an F3 petition (for married sons or daughters of U.S. citizens) or F4 petition (for siblings of U.S. citizens)—i.e., a grandchild or niece or nephew of a U.S. citizen—is entitled to automatic conversion and priority date retention, or either of them separately, under the CSPA.

II

Two cases, each with multiple plaintiffs, were consolidated before us in this appeal. The facts of these cases illustrate the family-sponsored immigration process and the age-out problem.

A

In one case, Rosalina Cuellar de Osorio was the beneficiary of an F3 petition filed by her U.S. citizen mother on May 5, 1998. Cuellar de Osorio's son, who was born in July 1984, was thirteen at the time and a derivative beneficiary of the F3 petition. By the time Cuellar de Osorio's priority date became current on November 1, 2005, her son had turned 21 and aged out of derivative status. Therefore, he was no longer eligible to immigrate with his mother. After Cuellar de Osorio became an LPR in August 2006, she filed an F2B petition (for adult sons or daughters of LPRs) on behalf of her son. Invoking the CSPA, she requested retention of the original F3 petition's May 5, 1998, priority date for the F2B petition, which would enable her son to immigrate much sooner than if he was assigned a more recent priority date based on the F2B filing date.

On June 23, 2008, Cuellar de Osorio filed a lawsuit against CIS in the Central District Court of California along with several other similarly situated plaintiffs who had asked CIS for (and not obtained) priority date retention for their aged-out children.[1] They sought declaratory and mandamus relief, alleging that CIS arbitrarily and capriciously failed to grant the requested priority dates in violation of the CSPA provisions codified at 8 U.S.C. § 1153(h)(3).

The district court held the case in abeyance pending a precedential BIA decision interpreting § 1153(h) in *Matter of Wang*. On June 16, 2009, the BIA issued its decision, which held that the automatic conversion and priority date retention provisions of the CSPA did not apply to derivative beneficiaries of F4 petitions. *See* 25 I. & N. Dec. 28 (B.I.A. 2009). The district court then granted summary judgment to CIS on October 9, 2009, holding that the BIA's interpretation of § 1153(h) in *Matter of Wang*, according to which the

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[1] Sisters Elizabeth Magpantay, Evelyn Y. Santos, and Maria Eloisa Liwag were each the beneficiary of an F3 petition filed by their U.S. citizen father on January 29, 1991. Each also has children who aged out of derivative status before the F3 petition's priority date became current on December 15, 2005. The sisters seek to retain the F3 petition's 1991 priority date on new F2B petitions they have filed for their now-adult sons and daughters.

Norma Uy was the beneficiary of an F4 petition filed by her U.S. citizen sister on February 4, 1981. She has a daughter, Ruth, who aged out of derivative status before the F4 petition's priority date became current in July 2002. Norma and Ruth seek to retain the F4 petition's 1981 priority date on a new F2B petition Norma has filed on behalf of Ruth.

Plaintiffs were not entitled to relief, should receive *Chevron* deference. Plaintiffs timely appealed.

B

Meanwhile, on June 20, 2008, Teresita G. Costelo and Lorenzo Ong had separately filed a class-action lawsuit in district court. Costelo was the beneficiary of an F3 petition filed by her U.S. citizen mother on January 5, 1990. At the time, she had two daughters, aged 10 and 13, who were derivative beneficiaries of the petition. By the time Costelo's priority date became current fourteen years later in 2004, both daughters had aged out of derivative status. After Costelo became an LPR, she filed F2B petitions for her adult daughters and requested retention of the January 5, 1990, priority date for the F2B petitions.

Ong was the beneficiary of an F4 petition filed by his U.S. citizen sister in 1981. At that time, he had two daughters, aged 2 and 4. By the time Ong's priority date became current twenty-one years later in 2002, his daughters had aged out of derivative status. In March 2005, after Ong obtained LPR status, he filed F2B petitions on behalf of his now-adult daughters and requested retention of the 1981 priority date for these petitions.

On July 16, 2009, the district court certified a class in *Costelo v. Chertoff*, 258 F.R.D. 600 (C.D. Cal. 2009) consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for

whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3).

After the parties cross-moved for summary judgment, the district court granted summary judgment to the government on November 12, 2009, again deferring to *Matter of Wang*. Plaintiffs timely appealed. The appeals in *De Osorio* and *Costelo* have been consolidated before us.

III

We review de novo a district court's grant of summary judgment. *Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006). The interpretation of a statute is a question of law, *United States v. Cabaccang*, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc), and "we review *de novo* the BIA's determination of questions of law, except to the extent that deference is owed to its interpretation of the governing statutes and regulations." *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011 (9th Cir. 2006). We review a precedential decision of the BIA interpreting a governing statute according to the principles of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999).

Under the familiar two-step *Chevron* framework, we first ask "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S. Ct. 2778. If it has, we "must give effect to the unambiguously expressed intent of Congress," regardless of the agency's interpretation. *Id.* at 842-43, 104 S. Ct.

2778. If, on the other hand, the statute is "silent or ambiguous" with regard to the issue, we proceed to step two and determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778 (footnote omitted). We must defer to the agency's interpretation if it is reasonable. *Id.* at 844, 104 S. Ct. 2778 (holding that when Congress has left a gap for an agency to fill, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator or agency.").

IV

We now turn to the statutory provision at issue. In order to address the age-out problem, Congress passed the CSPA in 2002. *See* Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002). The CSPA, in relevant part, amended the INA to provide as follows:

> (h) Rules for determining whether certain aliens are children
>
> (1) In general
>
> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement ... of this title shall be made using—
>
> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for perma-

nent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed . . . for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed ... for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

If the age of an alien is determined under paragraph (a) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153.

The parties do not dispute the meaning of paragraphs (1) and (2) above. Paragraph (1) provides that, if an alien applies for a visa within a year of one becoming available (i.e., within one year of the priority date on a relevant petition becoming current), the alien's age for purposes of determining whether she is

a "child" is determined by her age on the date the visa became available minus the number of days that the petition was "pending"—that is, the number of days between the *filing* of the petition with CIS and its *approval* by CIS. *See Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 993 (9th Cir. 2007). In this way, paragraph (1) ensures that an alien does not lose "child" status solely because of administrative delays in the processing of an otherwise valid petition. However, it does not address the much longer oversubscription delays that are typical between the *approval* of a petition and the *availability* of a visa.[2]

Paragraph (2), which is referenced at paragraph (1)(B), simply defines the universe of petitions to which the age-reduction formula in paragraph (1) applies. Paragraph (2)(A) refers to F2A petitions for children of LPRs. *See* 8 U.S.C. § 1153(a)(2)(A). Paragraph (2)(B) refers to any family preference petition for

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[2] For example, imagine that a U.S. citizen filed a petition for an alien relative on September 1, 2002, that was approved by CIS on September 15, 2002, and the beneficiary's priority date became current on September 15, 2010. The age of a beneficiary or derivative beneficiary for purposes of determining whether she was still a "child" would be determined by subtracting 15 days from her age on September 15, 2010. No adjustment to her age would be made to compensate for the eight years between September 15, 2002, and September 15, 2010. *See Ochoa-Amaya*, 479 F.3d at 993 (rejecting argument that a petition is "pending" for purposes of § 1153(h)(1)(B) from the date it is filed until the date a visa becomes available).

which a child is a derivative beneficiary.[3] *See id.* § 1153(d).

At issue is the meaning of paragraph (3), which provides relief to aliens who are 21 or over even after the age-reduction formula in paragraph (1) is applied. In such a case, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). Importantly, this is different from the relief offered by paragraph (1). Paragraph (1) allows an aged-out alien to remain eligible for a visa as a "child" under the original petition. Paragraph (3), in contrast, does not allow the aged-out alien to retain child status. Instead, it allows him to move into a different category as an *adult* without having to file a new petition and get a new priority date. The aged-out alien may still wait in line in the new category, but because he is able to retain an older priority date, his wait time is reduced. The parties dispute whether aged-out derivative beneficiaries of F3 and F4 petitions are entitled to this relief. To answer this question, we undertake our *Chevron* analysis.

A

Our first charge under *Chevron* is to ascertain, by "employing traditional tools of statutory construction," whether "Congress had an intention on the precise

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[3] It also refers to any employment-based or diversity-based petition for which a child is a derivative beneficiary. *See* 8 U.S.C. § 1153(b), (c). Those petitions are not relevant to this appeal.

question at issue." 467 U.S. at 843 n. 9, 104 S. Ct. 2778. We begin, as always, with an examination of the statute's plain language. *See Nw. Env. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011).

1

First of all, we reject any contention that the word "petition" in paragraph (3) is ambiguous because it is not defined by express reference to paragraph (2), as it is in paragraph (1). As we explain, express reference to paragraph (2) is unnecessary.

Paragraph (3)'s initial clause makes it contingent upon the operation of paragraph (1). *See* 8 U.S.C. § 1153(h)(3) ("If the age of an alien is determined under paragraph (1) to be 21 years of age or older . . ."). Thus, paragraph (3) is triggered only if one has determined by doing the age-reduction calculation in paragraph (1) that an alien is 21 or over.[4] If it is triggered, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* Because "the alien" is necessarily one to whom paragraph (1) was

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[4] The facts of Cuellar de Osorio's case illustrate how paragraph (1)'s calculation works with respect to paragraph (3). Cuellar de Osorio's original F3 petition was filed on May 5, 1998, and approved on June 30, 1998. Thus, it was "pending" for 56 days. Her son, who was a derivative of the F3 petition, was born on July 18, 1984. When the petition's priority date became current on November 1, 2005, he was 21 years and 106 days old. Subtracting the 56 days of "pending" time, his age is 21 years, 50 days. Therefore, he is 21 or over, and paragraph (3) is triggered.

applied, "the alien's petition" naturally refers to the "applicable petition" that was considered in paragraph (1)(B). *See id.* § 1153(h)(1)(B). After all, if the alien had a petition that was not an "applicable petition" under paragraph (1), the alien would never undergo the paragraph (1) calculation, and therefore, would never be considered at paragraph (3).

An "applicable petition" in paragraph (1) is explicitly defined by reference to paragraph (2). *See* § 1153(h)(1)(B) (referring to "the applicable petition described in paragraph (2)"). As explained previously, paragraph (2) describes F2A petitions for a child and any family preference petition for which a child is a derivative beneficiary. Therefore, paragraph (3) says that any of these petitions "shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). Despite this plain language, however, we find that paragraph (3)'s meaning is ambiguous for another reason.

2

The plain language of a statute does not control if "its application leads to unreasonable or impracticable results." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (internal quotation and citation omitted); *see also Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816 (9th Cir. 2004). Despite paragraph (3)'s plain language, it does not practicably apply to certain of the petitions described in paragraph (2).

The phrase "the alien's petition shall automatically be converted to the appropriate category," 8 U.S.C. § 1153(h)(3), suggests that the *same* petition, filed by the *same* petitioner for the *same* beneficiary, converts to a new category. This understanding comports with the ordinary meaning of the word "automatic," which implies that the conversion should happen without any outside input, such as a new petitioner. It also comports with current regulatory practice allowing "automatic conversion" of a petition between certain family preference categories upon the beneficiary's change in marital status or attainment of the age of 21, or upon the petitioner's naturalization. *See* 8 C.F.R. § 204.2(i). In each of these situations, it is the qualifying relationship that changes, *not* the identity of petitioner or the beneficiary. Since there is no change in the parties to the petition, the same petition can simply be reclassified "automatically."

Not so, however, for F3 and F4 petitions when a derivative ages out. In such a case, there is no "appropriate category" for the petition to "automatically be converted to" vis-a-vis the same petitioner. For example, in the case of an F3 petition for married sons and daughters of U.S. citizens for which a child is a derivative beneficiary, the original petitioner is the child's U.S. citizen grandparent. After the derivative turns 21, there is no qualifying relationship between the petitioner and the derivative, because a U.S. citizen cannot petition on behalf of an adult grandson or granddaughter. *See* 8 U.S.C. § 1153(a). The same difficulty arises in the case of an F4 petition for a U.S. citizen's sibling for which a child is a derivative beneficiary. The original petitioner is the child's U.S. citizen aunt or uncle. After the derivative turns 21,

there is no qualifying relationship between the petitioner and the derivative, because a U.S. citizen cannot petition on behalf of a niece or nephew. *See id.*

Appellants contend that there is an "appropriate category" for an aged-out F3 or F4 derivative to convert into because, at the moment paragraph (3) operates, the derivative can establish a qualifying F2B relationship as the adult son or daughter of an LPR. Paragraph (3) operates when a visa has become available for the derivative's parent as the primary beneficiary of the F3 or F4 petition, the derivative has applied for a visa within one year, and the derivative has been determined to be 21 or older under paragraph (1).[5] *See id.* § 1153(h)(1). At that point, the derivative's parent may have obtained LPR status under the original F3 or F4 petition, in which case the aged-out derivative qualifies for the F2B category. But while F2B may well be an "appropriate category" for the aged-out derivative to convert to, this conversion cannot "automatically" take place, given that a new petitioner—the LPR parent—is required. Appellants essentially ask us to ignore the word "automatically" in paragraph (3). We decline to do so. *See Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004)

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[5] To the extent that the government argues that paragraph (3) operates at the moment the derivative turns 21, we disagree. Paragraph (3) cannot possibly operate at the moment the derivative turns 21, because it is not even triggered until the derivative has already been determined to be *at least* 21 even after subtracting pending petition time as required by paragraph (1). *See* 8 U.S.C. § 1153(h).

("Courts must aspire to give meaning to every word of a legislative enactment.").

In short, despite the fact that the word "petition" in paragraph (3) can be read to encompass all petitions in paragraph (2), including F3 and F4 petitions, automatic conversion does not practicably apply to F3 and F4 petitions. Therefore, we find paragraph (3)'s meaning to be unclear.

3

Appellants argue that, regardless of whether automatic conversion applies, paragraph (3) unambiguously entitles an aged-out derivative beneficiary of an F3 or F4 petition to priority date retention. We disagree because we find that Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion.

Again turning to the text of paragraph (3), if an alien is determined to be 21 or older, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). It is certainly possible to read this language, which includes two grammatically independent clauses, as conferring automatic conversion and priority date retention as independent benefits. However, it is also entirely possible to interpret it as conferring those two benefits jointly. *See Li v. Renaud*, 654 F.3d 376, 382-83 (2d Cir. 2011) ("Congress could have, but did not, provide beneficiaries the option to select *either* conversion *or* retention *or* both."). Automatic conversion and priority date retention commonly (though not always) happen together in the

family-sponsored immigration scheme. *See* 8 C.F.R. § 204.2(i) (providing priority date retention with automatic conversion). *But cf. id.* § 204.2(a)(4) (granting priority date retention without automatic conversion). Furthermore, elsewhere in the CSPA, Congress much more explicitly indicated when it intended automatic conversion and priority date retention to operate independently. *See* CSPA § 6, *codified at* 8 U.S.C. § 1154(k)(3) ("Regardless of whether a petition is converted under this subsection or not, if an [alien] described in this subsection was assigned a priority date with respect to such petition . . . he or she may maintain that priority date.").

Because paragraph (3) can be interpreted both ways, it is ambiguous. When a statutory provision is ambiguous, we may "look to its legislative history for evidence of congressional intent," *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999), but in this case the legislative history is inconclusive. There is no specific discussion of particular age-out protections for derivative beneficiaries of family preference petitions. *See, e.g.*, H.R. Rep. No. 107-807, at 49-50 (2003). Because we find no clearly expressed congressional intent on the precise question whether derivative beneficiaries of F3 and F4 petitions are entitled to automatic conversion or priority date retention, we must proceed to step two of the *Chevron* analysis.

B

At step two of *Chevron* we ask whether the administering agency's interpretation of the statutory provision at issue is "permissible." *See* 467 U.S. at 843, 104 S. Ct. 2778. The step two test "is satisfied if the

agency's interpretation reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent." *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1116 (9th Cir. 2006) (internal quotation omitted). "We will not overturn an agency decision at the second step unless it is arbitrary, capricious, or manifestly contrary to the statute." *Ramos-Lopez v. Holder*, 563 F.3d 855, 859 (9th Cir. 2009) (internal quotation omitted).

The relevant agency interpretation of § 1153(h)(3) was articulated by the BIA in *Matter of Wang*, 25 I. & N. Dec. 28. In *Matter of Wang*, the BIA found that, under the existing regulatory scheme, "automatic conversion" happens only when "neither the beneficiary nor an immigration officer need take any action to effect the conversion to the new preference category." *Id.* at 35. Thus, the BIA concluded that a petition could only "automatically be converted" under § 1153(h)(3) when it could transfer from one visa category to another such that "the beneficiary of that petition then falls within a new classification without the need to file a new visa petition." *Id.* The BIA also concluded that priority date retention could *not* operate separately from automatic conversion, rejecting the contention that "all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future." *Id.* at 36; *see also id.* at 39 (finding no clear legislative intent "to create an open-ended grandfathering of priority dates that allow[s] derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time").

The effect of *Matter of Wang* is to limit § 1153(h)(3)'s applicability to only one petition type: F2A. This is the only petition with an "appropriate category" to which an aged-out primary or derivative beneficiary may "automatically be converted" without a change in petitioner. For example, an aged-out primary beneficiary of an F2A petition filed by his LPR parent can become the beneficiary of an F2B petition filed by that same parent. The same is true for an aged-out derivative beneficiary of an F2A petition filed by his LPR parent for a spouse.[6] But an aged-out derivative beneficiary of any other family preference petition category, such as F3 or F4, cannot qualify for a new category without a new petitioner

We find the BIA's interpretation of § 1153(h)(3) to be a "permissible" one. *See Chevron*, 467 U.S. at 843, 104 S. Ct. 2778. It "reflects a plausible construction of the statute's plain language," *Or. Trollers Ass'n*, 452 F.3d at 1116 (internal quotation omitted), because it accords with the ordinary usage of the word "automatic" to describe something that occurs without requiring additional input, such as a different petitioner. We also note that, contrary to Appellants' assertion, the BIA's construction does not render § 1153(h)(3)'s reference to § 1153(d) meaningless. *See* 8 U.S.C. § 1153(h)(3) (referring to "subsections (a)(2)(A) *and (d)*" (emphasis added)). The reference to subsection

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[6] Note that a child can be either a primary or a derivative beneficiary of an F2A petition. Many families choose to save filing fees by including a child as a derivative on an F2A petition for a spouse rather than as a primary beneficiary on a separate F2A petition.

(d), which entitles an alien beneficiary's child to the same status as the parent, has a clear function under the BIA's interpretation because it covers aged-out *derivative beneficiaries* of F2A petitions. Without this reference, only aged-out *primary* beneficiaries of F2A petitions would be entitled to relief, because subsection (a)(2)(A) refers only to the spouses or children of LPRS, not the children of alien beneficiaries.

Appellants also argue that the BIA's interpretation is unreasonable because it effects no significant change from the status quo. It is true that prior to CSPA's passage, an aged-out derivative beneficiary of an F2A petition was already entitled to priority date retention when an F2B petition was filed on his or her behalf. *See* 8 C.F.R. § 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, *the original priority date will be retained if the subsequent petition is filed by the same petitioner.*" (emphasis added)). But this regulation does not provide for automatic conversion, and it does not address aged-out *primary* beneficiaries of F2A petitions. Therefore, § 1153(h)(3) as interpreted by the BIA is not without effect.

Nor do we find that this interpretation "conflict[s] with Congress' expressed intent." *Or. Trollers Ass'n*, 452 F.3d at 1116. It is clear that Congress wanted the CSPA to provide some measure of age-out relief to *all* derivative beneficiaries of family preference petitions. *See, e.g.*, H.R. Rep. No. 107-807 at 49 (referring to the CSPA as "extend[ing] age-out protection" to the children of family-sponsored immigrants).

However, it is undisputed that *all* derivative beneficiaries are protected from age-out due to administrative delays under § 1153(h)(1). In fact, this was the only form of relief that House sponsors referred to when they introduced the provisions at issue, which the Senate had added. *See, e.g.*, 148 Cong. Rec. H4990 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner) (noting that the Senate's amendments addressed "situations where alien children lose immigration benefits by 'aging out' *as a result of INS processing delays.*") (emphasis added).

As the BIA recognized, protection from administrative delays was highly significant to Congress. *See Matter of Wang*, 25 I. & N. Dec. at 36-37 (noting that "the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions"). While the Senate bill's sponsor expressed an intent to address over subscription delays as well, she focused only on children of LPRs, who could fall into the F2A category. *See* 147 Cong. Rec. S3275-76 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein). Given that § 1153(h)(1) entitles *all* derivative children to relief from administrative delays, we cannot say that the BIA's interpretation of § 1153(h)(3) is contrary to congressional intent simply because it affords *additional* relief only to children in the F2A category.

Finally, we point out that limiting § 1153(h)(3)'s applicability to F2A petitions is "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845, 104 S. Ct. 2778. Applying § 1153(h)(3) to *all* derivative beneficiaries would result in a fundamental change to the family preference scheme, because it would effectively treat an aged-out derivative benefi-

ciary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen. However, those relationships have never been recognized as qualifying ones under U.S. immigration law. This same problem does not arise for a derivative of an F2A petition because he or she can be independently eligible for a priority date as the primary beneficiary of an F2A petition. It is therefore not arbitrary or otherwise unreasonable for the BIA's interpretation of § 1153(h)(3) to draw the line where it does. This interpretation warrants our deference under *Chevron*.

V

We hold that § 1153(h)(3) is ambiguous as to whether derivative beneficiaries of F3 and F4 family preference petitions are entitled to automatic conversion or priority date retention. Because we also hold that the BIA's interpretation of § 1153(h)(3) is reasonable, we defer to it under *Chevron*. Under that interpretation, automatic conversion and priority date retention do not apply to F3 and F4 petitions. Therefore, Appellants are not entitled to relief. The judgment of the district court is **AFFIRMED**.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NOS.: SACV 09-93 JVS(SHx), CV 08-6919 JVS(SHx),
CV 08-5301 JVS(SHx), EDCV 08-840 JVS(SHx)

BAILUN ZHANG, PLAINTIFF

v.

JANET NAPOLITANO, DEFENDANT

ARBI TOROSSIAN, ET AL, PLAINTIFFS

v.

DAVID DOUGLAS, ET AL., DEFENDANTS

SHAHAB DOWLATSHAHI, PLAINTIFF

v.

ERIC HOLDER, ET AL., DEFENDANTS

ROSALINA CUELLAR DE OSORIO, ET AL, PLAINTIFFS

v.

AYTES, ET AL, DEFENDANTS

Filed: Oct. 9, 2009

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO DISMISS *DOWLATSHAHI* ACTION

JAMES V. SELNA, District Judge.

These cases concern the proper interpretation of a provision of the Child Status Protection Act ("CSPA") § 203(h)(3) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1153(h)(3).

Plaintiffs in these actions are parents, and in some cases their adult children, who under § 203(h)(3) seek to transfer the priority date from family third- and fourth-preference ("F3" and "F4," respectively) visa petitions[1] to family second-preference ("F2B") visa petitions.[2] The F3 and F4 petitions were filed by U.S. citizen relatives on behalf of the parent-Plaintiffs, whereas the F2B petitions were filed by the parent-Plaintiffs on behalf of their adult sons and daughters after the parents became lawful permanent residents of the United States. These sons and daughters, named as derivative beneficiaries of the F3 and F4 petitions, lost eligibility to immigrate as derivative beneficiaries when they turned twenty-one before a

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[1] The F3 and F4 classifications are codified at 8 U.S.C. § 1153(a)(3) and (4), respectively.

[2] The F2B classification is codified at 8 U.S.C. § 1153(a)(2)(B). This provision relates to "unmarried sons or unmarried daughters," as opposed to the "children," of lawful permanent residents. In relevant part, a "child" is an unmarried person under age twenty-one. 8 U.S.C. § 1101(b)(1).

visa number became available to their parents. Plaintiffs now seek review of the U.S. Citizenship and Immigration Services's ("USCIS's") determination that the sons and daughters were not eligible to adjust status based on an automatic conversion of the F3 and F4 petitions to F2B petitions and the retention of the original priority date from the former petitions. Plaintiffs seek relief under the Declaratory Judgment Act, 28 U.S.C. § 2201; the All Writs Act, 28 U.S.C. § 1651; the Mandamus Act, 28 U.S.C. § 1361; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*

Presently before the Court are the parties' cross-motions for summary judgment under Federal Rule of Civil Procedure 56.

I. *Background*

These cases present a question of first impression for the federal judiciary. Defendants frame the issue as follows:

> [W]hether, under [§ 203(h)(3)], aliens who aged-out of their derivative [F3 and] F4 classification[s] may transfer the priority date from [those] petition [s] to a later F2B petition when the petitions [were] filed by different petitioners and after there has been a gap in eligibility for classification under the INA.

(Defs.' Mot. Br. 7-8.) No federal court has addressed this precise issue. But the Board of Immigration Appeals ("BIA") has issued a published decision in *Matter of Wang*, 25 I. & N. Dec. 28, 28 (B.I.A.2009), holding that "[t]he automatic conversion and priority date retention provisions of [§ 203(h)(3)] do not apply to an alien who ages out of eligibility for an immigrant

visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner." Accordingly, the issue here is whether the Court should give deference to *Wang* under the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

To make this inquiry, the Court provides background on the statutory provision at issue, the agency interpretation on point, and the factual circumstances of the present cases.

A. *Section 203(h)(3)*

Over a decade ago, "an enormous backlog of adjustment of status (to permanent residence) applications . . . developed at the INS." H.R. Rep. No. 107-45, p. 2 (2001), *as reprinted in* 2002 U.S.C.C.A.N. 640, 641. As a result, child beneficiaries of visa applications often would "age out," or turn twenty-one, before the application was processed, thereby requiring the applicant to shift into a lower preference classification and be placed "at the end of a long waiting list for a visa." *Id.* Most notably, "children" at the F2A classification would shift to the F2B classification for "unmarried sons [and] unmarried daughters" upon turning twenty-one. *Compare* 8 U.S.C. § 1153(a)(2)(A), *with id.* § 1153(a)(2)(B). The CSPA was enacted to provide age-out protection for individuals who were children at the time a petition or application for permanent resident status was filed on their behalf. *Padash v. INS*, 358 F.3d 1161, 1167 (9th Cir. 2004).

Among other things, the CSPA amended § 203 of the INA by adding what is now subsection (h). Section 203(h) provides that an alien's age for purposes of the F2A classification is to be determined by subtracting the time that the petition for classification was pending from the alien's age at the time that a visa number becomes available. 8 U.S.C. § 1153(h)(1)-(2). If the alien is determined to be twenty-one or older after applying this calculation, the statute provides for the automatic conversion of the petition to the appropriate category and the retention of the original priority date from when the original petition was filed. *Id.* § 1153(h)(3). Specifically, § 203(h)(3) provides:

> If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153(h)(3). This provision, at the heart of the controversy here, was interpreted by the BIA in *Wang*.

B. *The BIA's decision in Wang*

In *Wang*, a visa number became available to the plaintiff as a beneficiary of an F4 petition filed by his U.S. citizen sister after one of his daughters, a derivative of her father on the original petition, aged out. 25 I. & N. Dec. at 29. The plaintiff then filed an F2B petition for his aged-out daughter. *Id.* at 30. At issue in *Wang* was "whether a derivative beneficiary who has aged out of a fourth-preference visa petition

may automatically convert her status to that of a beneficiary of a second-preference category pursuant to [§ 203(h) of the INA]." 25 I. & N. Dec. at 30. In resolving this issue, the BIA squarely addressed the automatic conversion and priority date retention provisions of § 203(h)(3).

The BIA began by observing that the phrases "automatic conversion" and "retention" had recognized meanings in the regulatory and statutory context in which Congress enacted § 203(h)(3). The BIA noted that 8 C.F.R. § 204.2(i) provides for the "automatic conversion" from one preference category to another upon the occurrence of certain events, *id.* at 34 (citing Automatic Conversion of Classification of Beneficiary, 52 Fed. Reg. 33,797 (Sept. 8, 1987)), and that 8 C.F.R. § 204.2(a)(4) provides for "retention" of a priority date for "a lawful permanent resident's son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal petition filed by that same lawful permanent resident." *Id.* The BIA further observed that the CSPA added § 201(f) to the INA, for which the "conversion" of the original petition from one preference category to another occurs automatically by operation of law. *Id.* at 34-35. Based on these regulatory and statutory provisions, the BIA held that "conversion" means to shift from one visa category to another without the need to file a new visa petition, and that "retention" of priority dates is limited to visa petitions filed by the same family member. *Id.* The BIA therefore concluded that § 203(h)(3) did not apply to the plaintiff's daughter in *Wang:*

> First, with regard to the "automatic conversion" referenced in section 203(h)(3), we look to see to

> which category the fourth-preference petition converted at the moment the beneficiary aged out. When the beneficiary aged out from her status as a derivative beneficiary on a fourth-preference petition, *there was no other category to which her visa could convert because no category exists for the niece of a United States citizen.* Second, if we apply the "retention" language of section 203(h) here, we look to see if the new petition was filed on the beneficiary's behalf by the same petitioner. In the beneficiary's case, *the new visa petition has been filed by her father, not by her aunt (who was the original petitioner).*

Id. at 35 (emphases added). But the BIA's inquiry did not end there. The BIA also searched the CSPA's legislative history for evidence of a congressional intent to expand the use of the automatic conversion and priority date retention concepts. The BIA found none. Instead, the BIA noted that House reports and related statements from House members revealed "that the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications resulting in the aging out of beneficiaries of petitions filed by United States citizens and the associated loss of child status for immigration purposes." *Id.* at 36-37 (citing the Congressional Record). The BIA also found "repeated discussion in the House . . . of the intention to allow for retention of child status 'without displacing others who have been waiting patiently in other visa categories.'" *Id.* at 37 (citing the Congressional Record). Accordingly, the BIA held that the automatic conversion and priority date retention provisions did not apply to an alien who aged out of eligibility for an

immigrant visa as the derivative beneficiary of an F4 petition, and on whose behalf an F2B petition was later filed by a different petitioner. *Id.* at 38-39.[3]

C. *The Facts in These Cases*

The factual circumstances of these cases are similar to those in *Wang*.

Plaintiff Bailun Zhang immigrated to the United States from China in 2008 as the beneficiary of an F4 petition filed by his U.S. citizen sister in 1991. (Zhang Compl. ¶ 4.) His son was a derivative of that petition, but aged out prior to the date that Zhang's visa was issued. (*Id.* ¶ 9.)

Plaintiff Ojik Babomian came to the United States from Iran in 1996, and became a lawful permanent resident as the beneficiary of an F3 petition filed by her U.S. citizen mother in 1998. (Torossian Compl. ¶¶ 26, 30.) Plaintiff Arbi Torossian, her son, aged out before Babomian was eligible to adjust her status to that of lawful permanent resident in 2007. (*Id.* ¶ 31.)

Plaintiff Shahab Dowlatshahi immigrated to the United States as the beneficiary of an F4 petition filed by his U.S. citizen sister in 1993. (Dowlatshahi

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[3] The BIA's reasoning in *Wang* applies with equal vigor to the automatic conversion and priority date retention from an F3 to an F2B petition. For example, in the case of Torossian below, "there was no other category to which [his] visa could convert because no category exists for the [grandson] of a United States citizen," and "the new visa petition has been filed by [his mother], not by [his grandmother] (who was the original petitioner)." 25 I. & N. Dec. at 35.

Compl. at 2.) His daughter was a derivative of that petition, but aged out before Dowlatshahi's visa number became available.[4]

Plaintiffs Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, and Norma Uy became lawful permanent residents in 2006 and 2007 as the result of visa petitions filed by their U.S. citizen relatives. (de Osorio Compl. ¶ 9-13.) Plaintiff Ruth Uy is Uy's daughter. In the original visa petitions that resulted in the parent-Plaintiffs' current lawful permanent residence, their children were listed as derivative beneficiaries. These children aged out before their parents adjusted status.

The parent-Plaintiffs in these cases filed F2B petitions on behalf of their aged-out children. Plaintiffs filed suit claiming that, under § 203(h)(3), the F2B petitions should be assigned the priority date of the earlier F3 and F4 petitions filed by their U.S. citizen relatives.

With this background, the Court now considers the parties' cross-motions for summary judgment.

II. *Legal Standard*

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to

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[4] Dowlatshahi has moved to dismiss his case in light of the Court's class certification in a related case. (Docket No. 50.) Defendants do not oppose. (Docket No. 53.) The Court addresses this motion separately in Section III.C below.

any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The initial burden is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S. Ct. 2548. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S. Ct. 2505. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23, 106 S. Ct. 2505. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. *See id.* at 1137.

III. *Discussion*

There are no factual disputes here. Thus, the only issue is whether the USCIS's decision not to apply § 203(h)(3)'s automatic conversion and priority date

retention provisions in these cases runs afoul of the "arbitrary and capricious" standard of the APA.

Under the APA, a final agency action can be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *accord George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1010 (9th Cir. 2009).

The party challenging an agency's action as arbitrary and capricious bears the burden of proof. "'Indeed, even assuming the [agency] made missteps . . . the burden is on petitioners to demonstrate that the [agency's] ultimate conclusions are unreasonable.'" *George*, 577 F.3d at 1011 (alterations and ellipses in original) (quoting *City of Olmsted Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002)). Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account "if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004). Accordingly, review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment

for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989); *accord United States v. Snoring Relief Labs Inc.*, 210 F.3d 1081, 1085 (9th Cir. 2000).

Here, the Court finds that Plaintiffs have not carried their burden to show that the USCIS's action in these cases was arbitrary and capricious, and agrees with Defendants that the BIA's decision in *Wang* is entitled to *Chevron* deference.

A. *The Chevron Standard*

Wang is dispositive of this motion. The Plaintiffs fail to carry their burden on these cross-motions because, at bottom, they cannot show that *Wang* is not entitled to *Chevron* deference.

The U.S. Attorney General has vested the BIA with power to exercise its "independent judgment and discretion in considering and determining cases coming before [it]." 8 C.F.R. § 1003.1(d)(1). The Supreme Court has therefore recognized "that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). *Chevron* established a familiar two-step framework for deciding whether an agency's interpretation of a statute is proper. At the first step, the Court asks whether the statute's plain terms "directly address[] the precise question at issue." 467 U.S. at 843, 104 S. Ct. 2778. If the statute is ambiguous on the point, the Court defers at step two to the agency's interpretation

50 long as the construction is "a reasonable policy choice for the agency to make." *Id.* at 845, 104 S. Ct. 2778.

B. *Application of Chevron*

Here, Defendants' interpretation is permissible at both steps.

1. *Section 203(h)(3) Is Ambiguous*

The Court finds that § 203(h)(3) is ambiguous at *Chevron* step one, and endorses the explanation of this ambiguity articulated in *Wang* itself:

> If the beneficiary is determined to be 21 years of age or older pursuant to section 203(h)(1) of the Act, then section 203(h)(3) provides that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." Unlike sections 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the "delayed processing formula," *the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates.*

25 I. & N. Dec. at 33 (emphasis added). There is nothing on the face of the statute to support Plaintiffs' contention that this ambiguity arises only "by focusing on the wrong familial relationship as well as the wrong point in time." (Torossian Pls.' Opp'n Br. 3-4.) This contention is further belied by its reliance on the BIA's unpublished decision in *Matter of Garcia*, A79 001 587, 2006 WL 2183654 (B.I.A. June 16, 2006). That the BIA interpreted § 203(h)(3) differently on another

occasion does not prove that the provision is "plain and unambiguous." (Torossian Pls.' Opp'n Br. 2.) Indeed, it suggests the opposite. In any event, only the BIA's published decisions have precedential value. *See* 8 C.F.R. § 1003.1(g).

The Court need not belabor this point. Suffice it to say that Plaintiffs effectively concede the issue in their opposition briefs. According to Plaintiffs, when a hypothetical derivative beneficiary ages out of an F3 or F4 petition, "he automatically converts to the appropriate category (as determined by his relationship to the direct beneficiary[])." (Pls.' Opp'n Br. 8.) That Plaintiffs must add an explanatory parenthetical underscores the ambiguity surrounding the interpretation of § 203(h)(3).

2. *Wang's Interpretation of § 203(h)(3) Is Reasonable*

The Court also concludes that the BIA's interpretation of § 203(h)(3) in *Wang* was "a reasonable policy choice for the [BIA] to make" at *Chevron* step two. 467 U.S. at 845, 104 S. Ct. 2778.

The BIA in *Wang* declined to apply the automatic conversion and priority date retention provisions of § 203(h)(3) "[a]bsent clear legislative intent to create an open-ended grandfathering of priority dates that allow derivative beneficiaries to retain an earlier priority date set in the context of a different relationship, to be used at any time." *Id.* at 39. The BIA began by noting that the provision does not expressly state which petitions qualify for automatic conversion and priority date retention. *Id.* at 33. The BIA then found that the regulatory and statutory context, as well as the legislative record, supported a narrower

interpretation of § 203(h)(3). *Id.* at 34-39. The BIA concluded that the automatic conversion and priority date retention provisions did not apply to an alien who aged out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition was later filed by a different petitioner. *Id.* at 38-39. Hence, the BIA's interpretation in Wang finds ample regulatory and statutory support, and is buttressed by the Congressional Record. As such, it is reasonable.

Plaintiffs' arguments to the contrary are unavailing.

Plaintiffs contend that the CSPA was intended to protect those "who turned twenty-one and subsequently lost their eligibility for immigration benefits." (Torossian Pls. Opp'n Br. 6.) But they neglect to point out that Congress was also concerned with not "displacing others who have been waiting patiently in other visa categories." 25 I. & N. Dec. at 37 (citing the Congressional Record). In any event, the adult sons and daughters here faced no administrative delay per se, but rather a high demand for a limited number of visas. This accords with the BIA's observation in *Wang* that, "[w]hile the CSPA was enacted to alleviate the consequences of administrative delays, there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates." *Id.* at 38.

Plaintiffs also assert that the BIA's interpretation renders the words "and (d)" superfluous within the text of § 203(h)(3). But beneficiaries of petitions filed under subsection (d) include derivative beneficiaries of F2A petitions. Given the BIA's reliance on a perceived intent of Congress not to expand the protection of the

act, the Court cannot say that an interpretation of the reference to subsection (d) which restricts subsection (d) to beneficiaries of derivative F2A petitions is unreasonable. At a minimum there is an ambiguity, and it is the BIA's duty to resolve it.

Plaintiffs further contend that the BIA failed to discuss various regulatory and statutory provisions. But none of Plaintiffs' cited examples weigh heavily because none use the terms "conversion" and "retention" in conjunction. (Torossian Pls.' Opp'n Br. 16-18, citing 8 C.F.R. § 204.2(h)(2); 8 C.F.R. § 204.5(e); 8 C.F.R. § 204.12(f)(1); USA Patriot Act of 2001, Pub. L. No. 107-56, § 421(c) 423, 115 Stat. 272; Western Hemisphere Savings Clause, P.L. 94-571, 90 Stat. 2703 (October 20, 1976).)

Finally, Plaintiffs cite *Baruelo v. Comfort*, No. 05 C 6659, 2006 WL 3883311 (N.D. Ill. Dec. 29, 2006), for the proposition that adult sons and daughters should not have to go to the back of another line to wait for visa numbers to become available. But *Baruelo* is inapposite. There, the plaintiff was a primary beneficiary of an F2A petition filed by her mother, a lawful permanent resident. *Id.* at *1. The petition was approved but administrative delays prevented the plaintiff from obtaining her visa until after she had aged out into the F2B preference classification. The plaintiff in *Baruelo* is precisely the class of alien that the BIA determined to be eligible for automatic conversion and priority date retention under § 203(h)(3). Thus, the holding in *Baruelo* comports with the BIA's decision in *Wang*.

Accordingly, *Wang* is entitled to *Chevron* deference, and Defendants did not act arbitrarily or capri-

ciously in refusing to apply § 203(h)(3) to the adult sons and daughters in these cases.

C. *Dowlatshahi's Motion*

As a final matter, Plaintiff Shahab Dowlatshahi has filed a motion to dismiss his case. (Docket No. 50.) The motion is based on Dowlatshahi's asserted membership in a class certified under Rule 23(b)(2) by this Court in *Costelo v. Chertoff*, 258 F.R.D. 600 (C.D.Cal.2009):

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

Id. at 609. Dowlatshahi "believes that [Rule] 23(b)(2) renders his membership in the class created by *Costelo* as mandatory and therefore moves to dismiss his independent action." (Docket No. 50, at 7.) The Court entertains the motion despite its noncompliance with the Local Rules. (Docket No. 51.) To be sure, although the class in *Costelo* is mandatory in that class members do not have an automatic right to notice or a right to opt out of the class, *see Reeb v. Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 645-46 (6th Cir. 2006), the "mandatory" nature of the class does not necessarily preclude Dowlatshahi's separate suit. The Court nonetheless grants the motion in accordance

with Dowlatshahi wishes and in view of Defendant's non-opposition. (Docket No. 53.)

IV. *Conclusion*

For the foregoing reasons, the Court DISMISSES *Dowlatshahi v. Holder, et al.*, CV 08-5301 JVS (SHx). The Court DENIES the Plaintiffs' motions and GRANTS Defendants' motions in the remaining cases. The Court cannot compel Defendants to act where their inaction was not arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No.: SA08-00688-JVS(SHx)

TERESITA G. COSTELO, ET AL.

v.

MICHAEL CHERTOFF, ET AL.

Filed: Nov. 10, 2009

PROCEEDINGS: (IN CHAMBERS) ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO STAY DISCOVERY

JAMES V. SELNA, Judge.

Plaintiffs Teresita Costelo and Lorenzo Ong, appearing individually and on behalf of all others similarly situated (collectively, "Plaintiffs") and Defendants Janet Napolitano, *et al.* (collectively, "Defendants") have filed cross-motions for summary judgment under Federal Rule of Civil Procedure 56. Defendants have also filed a motion to stay discovery pending the decision on cross-motions for summary judgment.

I *Legal Standard*

Summary judgment is appropriate where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to

any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The initial burden is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*. 477 U.S. at 323. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id.* at 322-23. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

Where the parties have made cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will consider each party's evidentiary showing, regardless of which motion the evidence was tendered under. *See id.* at 1137.

II. *Discussion*

The issue in this case is whether a provision of the Child Status Protection Act ("CSPA"), § 203(h)(3) of the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1153(h)(3), allows "aged-out" derivative beneficiaries of third- or fourth-preference ("F3" and "F4," respectively) visa petitions to automatically

convert their derivative petitions to second-preference ("F2B") visa petitions, thereby retaining their original priority date. On July 19, 2009, the Court certified a class consisting of:

> Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3).

(Docket No. 74.)

This Court decided this exact issue in *Zhang v. Napolitano*, 663F. Supp. 2d 913, 2009 WL 3347345 (C.D. Cal. October 9, 2009), holding that the Board of Immigration Appeals's ("BIA") interpretation of § 203(h)(3) of the INA set forth in *Matter of Wang*. 25 I. & N. Dec. 28 (B.I.A. 2009) was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The BIA in *Wang* held that "[t]he automatic conversion and priority date retention provisions of [§ 203(h)(3)] do not apply to an alien who ages out of eligibility for an immigrant visa as the derivative beneficiary of a fourth-preference visa petition, and on whose behalf a second-preference petition is later filed by a different petitioner."

Plaintiffs have presented only one argument that was not explicitly considered in *Zhang*.[1] They argue that the *Wang* interpretation contradicts INA § 203(h)(4), which states that § 203(h)(l)-(3) "shall apply to self-petitioners and derivatives of self-petitioners." Plaintiffs argue that, under the BIA's interpretation, an aged-out derivative of a self-petitioner would have no appropriate category to automatically convert to, yet, § 203(h)(4) is explicit that § 203(h)(3) conversion applies to derivatives of self-petitioners.

Plaintiffs contention is simply incorrect. 8 U.S.C. §§ 1154(A) (1)(D)(i)(I) & (III) provide explicit statutory authority for automatic reclassification for a self-petitioner or derivative self-petitioner who ages-out prior to the priority date becoming current. Section 1154(A)(1)(D)(i)(I) states:

> Any child who attains 21 years of age who has filed a [self-petition] that was filed or approved before the date on which the child attained 21 years of age

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[1] In their Reply Brief, Plaintiffs also argued that Congress could not have been intended to solely address administrative delay in the CSPA because of the "opt-out" provision of INA § 204(k)(2) was aimed at preventing injustice where a F2B petition converted to the F1 line, which, for certain countries, had a longer wait. The Court fails to see the relevance of § 203(k)(2) to the situation here. The "opt-out" provision was intended to prevent the unmarried sons or daughters of lawful permanent residents from being penalized by their parents attaining U.S. citizenship. 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Sensenbrenner). It sought to prevent "naturalizing-out" and is unrelated to the "aging-out" provisions of CSPA.

> shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a petitioner for preference status under paragraph (1), (2), or (3) of section 1153(a) of this title, whichever paragraph is applicable, with the same priority date assigned to the self-petition. . . . No new petition shall be required to be filed.

Section 1154(A) (1)(D)(i)(III) states:

> Any derivative child who attains 21 years of age who is included in a [self-petition] that was filed or approved before the date on which the child attained 21 years of age shall be considered (if the child has not been admitted or approved for lawful permanent residence by the date the child attained 21 years of age) a VAWA self-petitioner with the same priority date as that assigned to the [self-petitioner]. No new petition shall be required to be filed.

Thus, there is no contradiction between *Wang* and INA § 203(h) (4). Self-petitioners or derivatives of self-petitioners are explicitly reclassified by statute when they age-out, leaving no gap of ineligibility, unlike the aged-out derivative beneficiaries of F3 or F4 petitions. Section 203(h)(4) supports, rather than contradicts, the Wang interpretation.

For the reasons laid out in *Zhang*, the Court finds that Section 203(h)(3) is ambiguous and that the BIA's interpretation is reasonable. *See Zhang*. 2009 WL 3347345, at *5-7. Accordingly, Defendants are entitled summary judgment.

III. *Conclusion*

For the foregoing reasons, the Court DENIES Plaintiffs' motion and GRANTS Defendants motion. Defendants motion to stay discovery is DENIED as moot.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos.: 09-56786, 09-56846.
D.C. Nos.: 5:08-cv-00840-JVS-SH,
8:08-cv-00688-JVS-SH.

ROSALINA CUELLAR DE OSORIO; ELIZABETH MAGPANTAY; EVELYN Y. SANTOS; MARIA ELOISA LIWAG; NORMA UY; RUTH UY, PLAINTIFFS–APPELLANTS

v.

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

TERESITA G. COSTELO; LORENZO P. ONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS–APPELLANTS

v.

JANET NAPOLITANO, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; LYNNE SKEIRIK, DIRECTOR, NATIONAL VISA CENTER; CHRISTINA POULOS, ACTING DIRECTOR, CALIFORNIA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; HILLARY RODHAM CLINTON, SECRETARY OF STATE, DEFENDANTS–APPELLEES

April 20, 2012

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX F

Section 1153 of Title 8 of the United States Code provides:

Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); ex-

cept that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or

institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to

that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction

Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date

The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) of this section before the enactment date of this subsection. In the case of a physician for whom an appli-

cation for a waiver was filed under subsection (b)(2)(B) of this section prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) of this section except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the

classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

(i) in which such alien has invested (after November 29, 1990) or, is actively in the

process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area

within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling

In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by 1/3 of the number of visas made available in the previous fiscal

year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region")

for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of

a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions

in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the

Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance

In the case of any alien claiming in his application for an immigrant visa to be described in section 1151(b)(2) of this title or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa

within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

(h) Rules for determining whether certain aliens are children

(1) In general

For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

OPPOSITION BRIEF

No. 12-930

IN THE

Supreme Court of the United States

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a U.S. citizen or lawful permanent resident petitions the government to issue a lawful permanent resident visa to a close relative, the relative's children under 21 may be included in the petition as "derivative beneficiaries." *See* 8 U.S.C. §1153(d). Alien relatives are allotted visas based on their relationship to the petitioner and the date of their petition's filing, known as their "priority date." Because of backlogs, it may take years or decades for an alien's priority date to become current, such that a visa is available for her. If a child who is listed as a derivative beneficiary turns 21 before a visa becomes available (known as "aging out"), he or she is no longer eligible for treatment as a derivative beneficiary, but rather must seek a visa by another route, often under a different statutory category as the adult son or daughter of a lawful permanent resident.

In 2002, Congress enacted the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927, which protects derivative beneficiaries from the consequences of turning 21 by, among other things, allowing them to retain their original priority date when they move to the new statutory category, rather than assigning them a new, later priority date that disregards the length of time they have already waited.

The question presented is:

Whether the protection extended by the Child Status Protection Act, 8 U.S.C. §1153(h)(3), applies to children included as derivative beneficiaries on petitions filed by U.S. citizens.

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IN THE

Supreme Court of the United States

No. 12-930

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

Respondents are law-abiding noncitizens who sought, through their U.S. citizen relatives, to immigrate to this country with their minor children, as the law permits. They waited patiently for years, in some cases decades, for visas to become available, and in that time their sons and daughters turned 21, such that they were no longer able to immigrate under the petition filed by their U.S. citizen relatives. Respondents became lawful permanent residents (LPRs), filed new petitions on behalf of their now-adult sons and daughters, and requested that those children receive credit for the years they had already spent waiting for visas, rather than being required to start again at the back of the

queue. The court of appeals correctly ruled that Congress expressly allowed that credit—known as "retention of priority date"—in the aptly-named Child Status Protection Act (CSPA), Pub. L. No. 107-208, §3, 116 Stat. 927, 928 (2002).

There are several reasons why the Court need not and should not review this case. Congress is currently considering a comprehensive immigration reform bill that would moot the question presented entirely. And while there is a shallow circuit split, it does not produce a risk of different enforcement in different circuits: a final judgment in the nationwide class action in this case would result in national uniformity without this Court's intervention.

Furthermore, the court of appeals' decision is correct. The government urges this Court to treat the plain statutory language as "ambiguous" and to defer to a reading of the CSPA that withholds the "retention of priority date" benefit from derivative beneficiaries (like Respondents' children) included on petitions filed by U.S. citizens. According to the government, Respondents' children must wait many more years before being allowed to reunite with their immediate family in the United States. That interpretation is at odds with the plain text, structure, and history of the CSPA, and the court of appeals was right to reject it.

STATEMENT

A. Background

1. The immigration law has long permitted U.S. citizens and LPRs to sponsor close relatives to immigrate to the United States. The U.S. citizen or LPR files a "Petition for Alien Relative" on Form I-130 (*see* Pet. App. 38a-39a) identifying the alien relative (the

"primary beneficiary"), and also in some circumstances identifying the relative's spouse or children under 21 (known as "derivative beneficiaries"). A primary beneficiary's spouse and children under 21 may receive an immigrant visa (green card) at the same time as the primary beneficiary. 8 U.S.C. §1153(d) (derivative beneficiaries are "entitled to the same status, and the same order of consideration" as the primary beneficiary).

If a petition meets all applicable criteria, then it is "approved," and the primary beneficiary and her derivative beneficiaries are eligible to receive green cards. Most beneficiaries, however, must wait, because annual numerical limits make it impossible to issue visas to all approved beneficiaries immediately.[1] The length of an alien's wait depends in part on the nature of the relationship between the petitioner and the primary beneficiary, which the Immigration and Nationality Act (INA) divides into four "preference categories," the second of which has two subcategories:

F1: unmarried adult sons or daughters of U.S. citizens (8 U.S.C. §1153(a)(1))

F2: F2A: spouses and minor children of LPRs (*id.* §1153(a)(2)(A))

F2B: unmarried adult sons or daughters of LPRs (*id.* §1153(a)(2)(B))

F3: married adult sons or daughters of U.S. citizens (*id.* §1153(a)(3))

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[1] The exceptions are spouses, children, and parents of U.S. citizens ("immediate relatives"), who are not subject to numerical limits and may receive visas immediately after the petition is approved. 8 U.S.C. §1151(b)(2); Pet. App. 39a.

F4: brothers and sisters of U.S. citizens (*id.* §1153(a)(4))

Beneficiaries receive visas based on "the order in which a petition in behalf of each such immigrant is filed." *Id.* §1153(e)(1). An alien's place in this "order" is determined by the date on which the petition seeking to permit her to immigrate is filed, referred to as the alien's "priority date." 8 C.F.R. §204.1(b); *see, e.g.*, 8 U.S.C. §1153(h)(3). In some circumstances, a beneficiary may wait decades before a visa becomes available.

2. Respondents' personal histories are varied, but all were the primary beneficiaries of family-based immigration petitions filed by a U.S. citizen parent (F3 petition) or sibling (F4 petition); they also all have children who were under 21 when the petition was filed.[2] When their priority dates became current, however, the children had already passed their twenty-first birthdays and were no longer eligible to receive green cards as derivative beneficiaries—a situation referred to as "aging out." Pet. App. 5a. After receiving their green cards, Respondents sought visas for their (now adult) children under the "F2B" preference category—for the adult son or daughter of an LPR—but their children ran the risk of being assigned a new, later priority date and being placed far behind others who had not been waiting as long as them.

To illustrate, Respondent Rosalina Cuellar de Osorio was the primary beneficiary of an F3 petition

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[2] One such child, Ruth Uy, is also a respondent. To reduce complexity, this brief refers to the primary beneficiaries of F3 and F4 petitions as "Respondents" and to the derivative beneficiaries, including Ruth Uy, as "Respondents' children."

filed by her mother, a U.S. citizen. Complaint ¶29, *Cuellar de Osorio* v. *Scharfen*, No. 08-cv-00840 (C.D. Cal. June 23, 2008) (Dkt. No. 1). The petition listed Ms. Cuellar de Osorio's son Melvin, who was thirteen, as a derivative beneficiary. *Id.* The petition was filed in May 1998 and approved a month later, but a visa did not become available until November 2005—four months after Melvin turned 21. *Id.* ¶¶29-30. Ms. Cuellar de Osorio immigrated to the United States in August 2006, leaving Melvin behind in El Salvador. In July 2007, Ms. Cuellar de Osorio filed an F2B petition for Melvin as the adult son of a lawful permanent resident. *Id.* ¶32.

Respondent Norma Uy was the primary beneficiary of an F4 petition filed by her U.S. citizen sister in February 1981. Compl. ¶35. The petition listed Norma's daughter Ruth Uy, who was two, as a derivative beneficiary. *Id.* The petition was approved on the day of its filing, but a visa did not become available until over 21 years later, in July 2002, at which point Ruth was 23. *Id.* ¶36. Norma immigrated and filed a new F2B petition for Ruth. *Id.* ¶¶37-39. The remaining Respondents are in similar situations.

3. Congress recognized and addressed this "aging out" problem when it enacted the CSPA in 2002. Section 3 of the CSPA, entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants," added 8 U.S.C. §1153(h), which addresses the problem in two ways. CSPA §3, 116 Stat. at 928.

First, paragraph (h)(1) provides that, for purposes of determining eligibility to be a derivative beneficiary, a child's age is reduced by the amount of time the government took to approve the petition (in Melvin Cuellar

de Osorio's case, this was one month (Pet. App. 11a); in Ruth Uy's case, one day (Compl. ¶¶35-36)). *See* 8 U.S.C. §1153(h)(1) (reducing the alien's age by "the number of days in the period during which the applicable petition ... was pending"). Paragraph (h)(1) applies to all petitions described in paragraph (h)(2), which in turn describes (i) F2A petitions on which children are listed as *primary* beneficiaries (*see id.* §1153(a)(2)(A), (h)(2)(A)), and (ii) family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries (*see id.* §1153(d), (h)(2)(B)).

Second, paragraph (h)(3) provides that, if the calculation in paragraph (h)(1) still yields an age over 21, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3).

Rosalina Cuellar de Osorio accordingly asked the government to permit Melvin to retain the same May 1998 priority date that he had when the original F3 petition was filed and to process his F2B petition using that date. Compl. ¶32. The other Respondents made similar requests. Had the requests been granted and the original priority dates used, Respondents' children would have been able to immigrate or adjust their status immediately. Instead, the government, without explanation, did not make visas available. *Id.* ¶¶33, 40, 49, 57, 64. Respondents filed suit, seeking to compel the government, in processing the F2B petitions, to allow their sons and daughters to keep the original priority date of the F3 or F4 petition that listed them as derivative beneficiaries.

B. District Court Proceedings

The district court addressed this issue in two separate opinions: *Zhang* v. *Napolitano*, which involved claims by individual Respondents only (Pet. App. 61a-78a), and *Costelo* v. *Chertoff*, a class action in which Respondents Costelo and Ong are lead plaintiffs (Pet. App. 79a-84a). The certified class consists of aliens who became LPRs as primary beneficiaries of F3 or F4 petitions that listed their children as derivative beneficiaries and who subsequently filed F2B petitions for their aged-out unmarried sons and daughters, for whom the government refused to allow automatic conversion or priority date retention under Section 1153(h)(3). *See* Pet. App. 77a.

In *Zhang*, Respondents initially relied on an unpublished decision of the Board of Immigration Appeals (BIA), which held that a child listed on an F4 petition filed for her mother by her mother's U.S. citizen sister was entitled, after she turned 21, to "retain the ... priority date that applied to the original fourth-preference petition," meaning that "a visa number under the second-preference category is immediately available to the respondent." *Matter of Garcia*, 2006 WL 2183654, at *4 (BIA June 16, 2006).

In June 2009, the BIA issued *Matter of Wang*, 25 I. & N. Dec. 28 (2009), which disapproved *Garcia* and ruled that a child listed as a derivative beneficiary on an F4 petition filed by a U.S. citizen relative could not retain her priority date for purposes of a later F2B petition filed by her parent. Mr. Wang was the primary beneficiary of an F4 petition filed on December 28, 1992, by his U.S. citizen sister, which listed his minor daughter as a derivative beneficiary. By the time a visa became available, Mr. Wang's daughter had turned

21. Mr. Wang filed an F2B petition for his daughter and asked that she be allowed, under Section 1153(h)(3), to retain the 1992 priority date. *Id.* at 29.

The BIA held that the CSPA "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The BIA concluded, however, that the phrase "automatic conversion" had a "recognized meaning" that applied only where "a visa petition converts from one visa category to another ... without the need to file a new visa petition," and only where the petitioner remained the same. *Id.* at 34-35. The BIA also held that "retention" of priority dates applied only to "visa petitions filed by the same family member," whereas a petition "filed by another family member receives its own priority date." *Id.* The BIA believed that the CSPA's use of "retention" should be interpreted in light of prior regulations, under which retention of priority dates was expressly "limited to a[n] [LPR]'s son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal [F2A] petition filed by that same [LPR]." *Id.* at 34 (discussing 8 C.F.R. §204.2(a)(4)). Because Mr. Wang's adult daughter had been a derivative beneficiary on an F4 petition filed by a U.S. citizen (Mr. Wang's sister), not an F2A petition filed by an LPR parent, the BIA ruled that Mr. Wang's daughter could not benefit from the CSPA's date-retention provision to retain the 1982 priority date. Accordingly, Mr. Wang's daughter was given a much later priority date of September 5, 2006—the date Mr. Wang filed his daughter's F2B petition. *Id.* at 39.

In a decision issued in the *Zhang* case, the district court treated *Wang* as "dispositive." Pet. App. 72a. The court concluded that Section 1153(h)(3) was ambiguous, based on the BIA's statement that the provision

by itself did not "'expressly state which petitions qualify for automatic conversion and retention of priority dates.'" *Id.* 73a (quoting *Wang*, 25 I. & N. Dec. at 33) (emphasis omitted). The court then concluded that the BIA acted "reasonabl[y]" in deciding that the only derivative beneficiaries who could benefit from the date-retention provision in Section 1153(h)(3) were "beneficiaries of derivative F2A petitions" filed by LPRs. *Id.* 75a-76a. The court accordingly deferred to *Wang* under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The same judge later granted summary judgment in *Costelo* on the same grounds. Pet. App. 83a-84a.[3]

C. Court Of Appeals Proceedings

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed.[4] The court summarized the issue as "whether an aged-out derivative beneficiary of an F3 petition ... or F4 petition ... is entitled to automatic conversion and priority date retention, or either of them separately, under the CSPA." Pet. App. 42a.

Notably, the panel "reject[ed] any contention that the word 'petition' in paragraph [(h)](3) is ambiguous because it is not defined by express reference to paragraph [(h)](2)." Pet. App. 50a. As the panel observed, paragraph (h)(3) is triggered only if application of paragraph (h)(1) yields a calculated age for the derivative beneficiary that is over 21. *Id.* 50a & n.4 (when a visa

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[3] The court ruled that the BIA's reasoning applied to derivative beneficiaries listed on F3 and F4 petitions "with equal vigor." Pet. App. 68a n.3.

[4] The two litigations were consolidated before the Ninth Circuit. *See* Pet. App. 1a.

was available for Respondent Cuellar de Osorio, her son Melvin was considered 21 years, 50 days old under the paragraph (h)(1) calculation, thus "paragraph [(h)](3) is triggered"). Accordingly, the panel ruled that paragraph (h)(3) applies to "*any* family preference petition for which a child is a derivative beneficiary." *Id.* 51a (emphasis added).

"Despite this plain language, however," the panel concluded that paragraph (h)(3) was ambiguous because it did not "practicably apply" to Respondents' situations. Pet. App. 51a. The panel held that the phrase "the alien's petition shall automatically be converted to the appropriate category" (8 U.S.C. §1153(h)(3)) could not apply where "a new petitioner—the LPR parent—is required" (Pet. App. 52a-53a). Thus, "despite the fact that the word 'petition' in paragraph [(h)](3) can be read to encompass all petitions in paragraph [(h)](2)," including F3 and F4 petitions listing derivative beneficiaries, the panel found "paragraph [(h)](3)'s meaning to be unclear." *Id.* 54a.

The panel also ruled that "Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion." Pet. App. 54a. The panel believed it "certainly possible" to read the "two grammatically independent clauses" as "conferring automatic conversion and priority date retention as independent benefits," but also thought it possible that the benefits were conferred "jointly." *Id.*

Turning to the BIA's interpretation, the panel confirmed that the "effect of *Matter of Wang* is to limit §1153(h)(3)'s applicability to only one petition type: F2A," *i.e.*, petitions filed by LPRs for their spouses or minor children. Pet. App. 57a. But children listed on petitions filed by U.S. citizens, "such as F3 or F4, can-

not qualify." *Id.* The panel found the BIA's conclusion reasonable. *Id.* 60a.

The court of appeals granted rehearing en banc and reversed, finding that the BIA's interpretation "conflicts with the plain language of the CSPA," which "unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries." Pet. App. 3a. The en banc court framed the question as "whether the automatic conversion and date retention benefits provided by subsection (h)(3) apply only to aged-out F2A petition beneficiaries," *i.e.*, beneficiaries of certain petitions filed by LPRs, "or whether they also apply to derivative beneficiaries of the other family visa categories," *e.g.*, derivative beneficiaries of petitions filed by U.S. citizens. *Id.* 9a.

The en banc court rejected the government's request that paragraph (h)(3) be considered "in a vacuum." Pet. App. 14a-15a. Like the panel, the en banc court concluded that paragraph (h)(3) "cannot function independently" of the rest of Section 1153(h) and that, when viewed in its statutory context, it applied to all derivative beneficiaries, not simply F2A beneficiaries. *Id.* 16a. "The plain language of the statute thus conclusively resolve[d] the question[.]" *Id.*

The court also noted Congress's use of an identical phrase in paragraphs (h)(1) and (h)(3): "for [the] purposes of subsections (a)(2)(A) and (d)." Pet. App. 16a. The words "and (d)" refer to "derivative visas for the children of primary beneficiaries of *all* visa categories" (*id.* (discussing 8 U.S.C. §1153(d)) (emphasis added))—an interpretation the government did not dispute as to paragraph (h)(1)'s reference to "and (d)." *Id.* The court rejected the government's argument that the phrase

"and (d)" be given a different meaning in paragraph (h)(3) from the one it has in paragraph (h)(1). *Id.*

The court also rejected the government's argument that applying paragraph (h)(3) to derivative beneficiaries of petitions filed by U.S. citizens would be "impracticable" because it supposedly required a new person (the beneficiary's LPR parent) to file a petition. Pet. App. 19a ("The language of the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant."). While the statute's plain language directed a change in policy, it "cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented." *Id.* The court rejected the government's arguments that difficulties in implementation constituted a "'rare and exceptional circumstance'" warranting deviation from the CSPA's plain language. *Id.* (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)).

Judge Smith dissented, joined by four other judges. Judge Smith acknowledged that the court's reading of the statute was "reasonabl[e]," but believed that the phrase regarding automatic conversion "complicate[d] matters." Pet. App. 27a-28a. The dissent also believed that paragraph (h)(3) "ties automatic conversion and retention of an original priority date together," such that the paragraph was ambiguous as to whether the two benefits were distinct. *Id.* 32a. Because the dissent believed that "th[e] provision's plain terms do not yield a clear and consistent answer," it would have deferred to the BIA's interpretation in *Wang*. *Id.* 33a.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW

Congress is now considering a comprehensive immigration reform bill that would moot this case. On May 21, 2013, the Senate Judiciary Committee reported to the full Senate a bill that, among other things, rewrites the provision at issue here. S. 744, 113th Cong., §2305(d)(5)(C) (2013). The new language leaves no doubt that *all* derivative beneficiaries who age out—including derivative beneficiaries of F3 and F4 petitions—retain their original priority dates. *See id.* (adding 8 U.S.C. §1153(h)(3)(A)). The bill also adds a new sub-paragraph 1153(h)(3)(B), which guarantees that "[t]he beneficiary of any petition shall retain his or her earliest priority date ... regardless of the category of subsequent petitions." *Id.* The bill thus renders this Court's review unnecessary. *Cf. United States* v. *Varca*, 896 F.2d 900 (5th Cir.), *cert. denied*, 498 U.S. 878 (1990) (denying certiorari despite a 5-4 circuit split over the interpretation of a repealed statute).

There are other reasons to deny certiorari. Although there is a narrow circuit split, not every nominal circuit split deserves review, especially where the decision appealed from is correct and uniformity in the administration of federal law can be achieved without this Court's review. *E.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991) (declining to decide issue notwithstanding circuit split because the Sentencing Commission was likely to resolve the issue). Here, the district court certified a nationwide class. Order Certifying Class, *Costelo* v. *Chertoff*, No. 08-cv-00688 (C.D. Cal. July 16, 2009) (Dkt. No. 74). There is thus no dan-

ger that similarly situated individuals will be treated differently based on where they live.[5]

The uniformity imposed by the nationwide class also undermines the government's complaint (Pet. 28-32) about administrative challenges in implementing the judgment below. The government can comply with the judgment using a single system nationwide. To the extent that means the system must "be overhauled" (*id.* 28), that is simply the consequence of the agency's failure so far to adhere to Congress's clear mandate.

In any event, the government's assertions about the difficulties of implementing paragraph 1153(h)(3) as properly interpreted are unsupported and largely exaggerated. The Fifth Circuit reached the same result in 2011 as the Ninth Circuit did here, and the government did not petition for certiorari. *See Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011). The government presumably has complied with that precedent as to all applications originating in the immigrant-heavy Fifth Circuit. It is significant, therefore, that rather than cite specific problems it has had complying with *Khalid*,

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[5] Although the current class includes only beneficiaries of F3 and F4 petitions, the government appears to agree (Pet. 28-29 & n.6) that the decision below governs F1 and F2B petitions as well. In any event, the *Costelo* plaintiffs intend to seek to expand the class on remand to all family-preference petitions, which is yet another reason to deny the petition. *Cf. Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari) (observing that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (noting that the interlocutory nature of an order "alone furnishe[s] sufficient ground for the denial of the application").

the government's petition complains only of hypothetical challenges.

Accordingly, the government has shown no "compelling reason[]" for this Court's intervention (S. Ct. R. 10), given Congress's imminent attention to the very provision at issue and the ability to secure nationwide uniformity without this Court's review. Moreover, as the balance of this brief explains, the court of appeals correctly decided the issue.

II. THE COURT OF APPEALS' DECISION IS CORRECT

A. The CSPA's Text, Structure, And History Unambiguously Foreclose The BIA's Interpretation

1. The plain language of 8 U.S.C. §1153(h)(3) makes clear that the paragraph's benefits are available to *all* derivative beneficiaries who age out.

Paragraph (h)(3) defines the relevant eligibility criteria that "an alien" must meet to fall within its terms by cross-referencing other provisions: "paragraph [(h)](1)" and "subsections (a)(2)(A) and (d) of this section." Paragraph (h)(1), in turn, repeats paragraph (h)(3)'s reference to "subsections (a)(2)(A) and (d) of this section," and also directs the reader to "the applicable petition described in paragraph [(h)](2)." These cross-references each cover the same set of petitions: F2A petitions on which children are listed as *primary* beneficiaries (*see* 8 U.S.C. §1153(a)(2)(A), (h)(2)(A)) and all family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries (*see id.* §1153(d), (h)(2)(B)). The benefits set forth in paragraph (h)(3) then apply to those aliens within that set whose age is determined to be 21 or older using the formula described in paragraph (h)(1). *Id.* §1153(h)(3).

As both the panel and the en banc court recognized, these cross-references unambiguously indicate that the benefits provided in paragraph (h)(3) apply to "all visa petitions identified in subsection (h)(2)" filed on behalf of beneficiaries "determined under paragraph [(h)](1) to be 21 years of age or older" (8 U.S.C. §1153(h)(3)). Pet. App. 24a; *see id.* 50a-51a. When an alien falls within paragraph (h)(1)'s scope, but the relief provided in that paragraph proves insufficient, the statute directs that the alien receive the relief provided in paragraph (h)(3)—namely, that the alien's petition "automatically be converted to the appropriate category" and that the alien "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3).

This interpretation is the only one that treats paragraph (h)(3) consistently with the remainder of subsection 1153(h). *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Congress used the same terminology—"for the purposes of subsections (a)(2)(A) and (d)"—in both paragraphs (h)(1) and (h)(3). The government has not disputed that this language, when used in paragraph (h)(1), indicates that relief under that paragraph is available not only to derivative beneficiaries of F2A petitions, but to *all* derivative beneficiaries. *See* Pet. App. 16a. The government's argument, however, would give the words "and (d)" a different, narrower meaning in paragraph (h)(3) compared to paragraph (h)(1), contrary to the "presumption that a given term is used to mean the same thing throughout a statute." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Additionally, the provision adding subsection (h) has a title that suggests broad application to all derivative beneficiaries. CSPA §3, 116 Stat. at 928 ("Treat-

ment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants"). Nothing in the provision's text indicates that Congress intended it to have a far narrower scope than its title describes. *See Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (interpreting statute consistently with its title).

Furthermore, had Congress intended to provide only the narrow relief that the government advocates, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010). Indeed, Congress elsewhere identified the *specific class of people* to whom the government now wishes to limit paragraph (h)(3). *See* 8 U.S.C. §1101(a)(15)(V) (limiting certain visas to "an alien who is the beneficiary (including *a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section [1153](a)(2)(A)*" (emphasis added)). That Congress did not use such language in paragraph (h)(3) indicates that no comparable limitation was intended. *Nken* v. *Holder*, 556 U.S. 418, 430 (2009).

2. The correctness of giving the statute its plain meaning is reinforced by the fact that, under the government's contrary reading, the only derivative beneficiaries who could seek relief under Section 1153(h)(3) would be those who did not need it. Regulations promulgated 20 years earlier already protected children of F2A primary beneficiaries from aging out. 8 C.F.R. §204.2(a)(4) (aged-out F2A derivative beneficiaries retain their original priority dates); *see* 57 Fed. Reg. 41053, 41059 (Sept. 9, 1992)). The government ventures (Pet. 22) that the CSPA might have been intended merely to codify that regulation, but there is no support for that speculation; if anything, the legislative history reveals that Congress meant to *change* the status quo

by providing protection not previously available. *See infra* p. 19.

Indeed, had Congress wished simply to codify the regulation, it would have included the regulation's requirements that a separate petition be filed for an aged-out derivative beneficiary and that the subsequent petition be filed by the original petitioner. *See* 8 C.F.R. §204.2(a)(4). The failure to include those requirements confirms that paragraph (h)(3) was not meant to codify the regulations, but instead to set forth a new system in which the regulations' restrictions were no longer applicable. *See* Pet. 22-23 n.5 (admitting that paragraph (h)(3) "superseded" the regulation's requirement that "a new petition be filed for an aged-out derivative beneficiary").[6]

3. The Ninth Circuit's reading of the CSPA, unlike the BIA's, fulfills Congress's purpose and "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Congress's goal in passing the CSPA was to "facilitate[] and hasten[] the reuniting of legal immigrants' families." 148 Cong. Rec. H4989, H4991 (daily ed. July 22, 2002) (Rep. Sensenbrenner); *see also id.* ("It is family-friendly legislation that is in keeping with our proud traditions."); *id.* (Rep. Jackson-Lee) ("[W]here we can correct situations to bring families together, this is ex-

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[6] The government cites *Kucana*, 558 U.S. 233, with a "cf." and without elaboration. Pet. 22. The statute in *Kucana* followed an extensive dialogue between Congress and the agency about particular regulations, which strongly suggested that codification was what Congress had in mind. *See Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008). No comparable evidence exists here.

tremely important .... [T]his is an important bill that helps those who are aging out and brings families together."). Paragraph (h)(3) achieves that goal by ensuring that sons and daughters who have already waited in line for many years can immigrate with or shortly after their parents, instead of being separated from their families for years or decades more. The government's interpretation of Section 1153(h) undermines the legislation's very purpose by consigning the vast majority of aged-out derivative beneficiaries to more years of waiting, often apart from their families. While a statute's plain text might be ignored if it would produce an absurdity, there is nothing absurd about Congress deciding that a form of relief that regulations previously afforded to aliens whose only demonstrated tie to this country was LPR parents should be made available to others who not only have an LPR parent, but also an additional U.S. citizen relative.

The government suggests (Pet. 20) that Congress meant to achieve its family-reunification goal by addressing only processing delays, not delays caused by immigration backlogs. That is a curious suggestion given that Congress added similarly worded provisions to address each problem separately—(h)(1) for processing delays and (h)(3) for immigration backlog delays. Senator Feinstein, who sponsored the original Act and who added subsection (h) to the version that was ultimately enacted, voiced the intent to address both problems and to do so for *all* derivative children beneficiaries, regardless of whether they were listed on "a family-based, employment-based, or diversity visa" application. 147 Cong. Rec. S3275, S3275 (daily ed. Apr. 2, 2001); *see also id.* (identifying two problems caused by the aging-out anomaly: (1) "the INS was unable to adjudicate the application before the child's 21st birth-

day" and (2) "growing immigration backlogs in the immigration visa category caused the visa to become unavailable before the child reached his 21st birthday").[7] Another provisions of the Act clearly address backlog delay, not processing delays. *See* CSPA §6, 116 Stat. at 929 (codified at 8 U.S.C. §1154(k)) (permitting F2B petitions eligible for conversion to F1 to remain as F2B petitions when the F1 backlog is longer than the F2B backlog). The government's interpretation thus ignores both the object and the scope of Congress's goals in passing the CSPA.

B. The Government's Claim Of Ambiguity Lacks Merit

The government's contention (Pet. 16-22) that paragraph (h)(3) is ambiguous is unfounded. First, while a shallow circuit split has arisen on the meaning of paragraph (h)(3), no circuit has accepted the government's argument that the statute is ambiguous. The government ventures (*id.* 24) that the circuit split itself evidences ambiguity, but this Court has held otherwise. *See Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1355 n.4, 1363 n.12 (2012) (concluding that the term "newly awarded compensation" is unambiguous despite a circuit split over its meaning); *cf. Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1706, 1709 (2012); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) ("A statute is not ambiguous for purposes of lenity merely because there is a

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[7] Although the Senate ultimately amended the House bill rather than enact Senator Feinstein's original bill, the Senate's amendments served the same purposes, as evidenced by the inclusion of both paragraphs (h)(1) and (h)(3).

division of judicial authority over its proper construction." (citation and quotation marks omitted)).

In any event, the government's claim of ambiguity is meritless.

1. The government's principal claim is that derivative beneficiaries of F2A petitions are the only derivative beneficiaries whose petitions can "automatically be converted to the appropriate category." *See* Pet. 17-18, 22. But even if this argument were correct (which it is not, *see infra* pp. 26-29), that would not justify disturbing the judgment below. "Retention of priority date"—the remedy mentioned in paragraph (h)(3)'s heading—is available to all derivative beneficiaries who have aged-out after application of the formula set forth in paragraph (h)(1), regardless of whether the beneficiary's petition is automatically converted to a different category. Notably, the BIA never considered whether the retention of priority date and automatic conversion benefits are independent; as a result, no deference is owed the government on this question. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question").[8]

a. Paragraph (h)(3) does not condition the alien's retention of her priority date upon the automatic conversion of the alien's petition. The statute contains on-

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[8] Accordingly, Respondents need not show—as the government appears to suggest (Pet. 18-19 n.4)—that paragraph (h)(3) "unambiguously" provides that the retention of priority date and automatic conversion benefits are separate. Regardless, however, the language makes clear that those benefits *are* separate as discussed in the text.

ly one eligibility criterion: "the age of [the] alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3). Once that condition is satisfied, two separate benefits accrue: First, "the alien's petition shall automatically be converted to the appropriate category." *Id.* Second, "the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* In other words, the statute contains the following structure: "In the case of A, then B shall be done and C shall be done." This sentence structure shows that B and C are not dependent on one another. (Were a ski lodge director to instruct her grounds crew: "If it snows on a cabin, then you shall shovel the cabin's sidewalk and you shall keep the cabin's heat above 65 degrees," she would be justifiably angry if the crew let the pipes freeze in cabins lacking a sidewalk.)

This Court has recognized that where the word "and" connects two clauses that confer distinct benefits, those clauses operate independently. In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), this Court considered Section 506(b) of the Bankruptcy Code, which provides: "[T]here shall be allowed to the holder of such claim, [1] interest on such claim, and [2] any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." (First alteration in original.) In *Ron Pair*, a creditor was not entitled to the statute's second benefit—"reasonable fees, costs, or charges provided for under the agreement"—because the claim did not arise under an agreement. The Court nonetheless held that the creditor was entitled to recover the first benefit—interest on the claim—because, "[b]y the plain language of the statute, the two types of recovery are distinct." *Id.* at 242.

The same is true here. Paragraph (h)(3)'s two benefits—automatic conversion of a petition and an alien's retention of her priority date—are "distinct" benefits, a point reinforced by two further textual features. Congress distributed the mandate "shall" separately to paragraph (h)(3)'s two benefits. If the derivative beneficiary's age is calculated to be over 21, "the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3) (emphases added). This syntax emphasizes that automatic conversion and retention of priority dates are separately mandated.

Relatedly, the two clauses have different subjects. While "the alien's *petition*" is automatically converted, it is "*the alien*" who retains her priority date. 8 U.S.C. §1153(h)(3) (emphases added). The government misstates the provision when it asserts that the statute "provides that when 'the alien's petition' is transformed through conversion, *it* nevertheless 'retain[s]' the priority date." Pet. 21 (emphasis added). Only through that subtle but critical mischaracterization of the statutory language—replacing "the alien" with a pronoun ("it") that has a different antecedent ("the alien's petition")—can the government avoid Congress's mandate that "the alien," and not "the alien's petition," retain the priority date. Thus, even if a new petition must be filed for the aged-out derivative beneficiary, "the alien" is the same, and it is she who retains her original priority date.

b. In a footnote, the government advances two responses to this construction of paragraph (h)(3). *See* Pet. 18-19 n.4. Neither has merit.

First, the government contends that "'the concept of "retention" of priority dates has always been limited' to a situation in which there was a successive petition filed by the same petitioner." Pet. 18-19 n.4 (quoting *Wang*, 25 I. & N. Dec. at 35). That premise is incorrect: several other provisions permit an alien to retain her priority date despite a change in petitioner. *See, e.g.*, 8 C.F.R. §204.2(h)(2) (permitting an alien whose abusive parent or spouse petitioned on her behalf "to transfer the visa petition's priority date to [a later-submitted] self-petition"); *id.* §204.5(e) ("A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for *any subsequently filed petition* for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify." (emphasis added)); *id.* §204.12(f) (providing that a "physician beneficiary" who finds a *new employer* or establishes her own practice must submit a new Form I-140 (Immigrant Petition for Alien Worker) but "will retain the priority date from the initial Form I-140"); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, §9, 90 Stat. 2703, 2707 ("Any petition filed by, or in behalf of, [an alien formerly classified as a 'Western Hemisphere' immigrant] to accord him a preference status under section 203(a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien.").

The error of the government's premise—that an alien can only retain her priority date when the petitioner remains the same—is compounded by the fact that the pre-CSPA regulation providing relief for aged-out beneficiaries saw fit to require that expressly. 8 C.F.R. §204.2(a)(4) ("the original priority date will be retained" only where "the subsequent petition is filed by the

same petitioner"). That language would have been superfluous if, as the government now argues, priority date retention necessarily required a petition by the same petitioner.

Second, the government argues (Pet. 18-19 n.4) that paragraph (h)(3) cannot be read to confer two separate benefits because Congress "unyoked" the two benefits in another section of the CSPA, 8 U.S.C. §1154(k)(3). That is a classic *post hoc* litigation position. As noted above, the BIA has never passed on whether paragraph (h)(3)'s benefits are independent, and the government cannot claim deference to such an argument. *See Bowen*, 488 U.S. at 212.

In any event, the government's Section 1154(k) argument is incorrect. Section 1154(k) provides that, where a petition is initially filed by an LPR on behalf of her unmarried son or daughter (an F2B petition), and the LPR petitioner naturalizes while the petition is pending, the F2B beneficiary son or daughter may "elect[]" whether to have his or her petition "conver[ted]" to the F1 category (as an unmarried son or daughter of a citizen). 8 U.S.C. §1154(k)(1)-(2). Congress provided for this "election" because the F1 category for immigrants from certain countries had a longer waiting period than the F2B category. *Matter of Zamora-Molina*, 25 I. & N. Dec. 606, 614 (BIA 2011). Congress thus sought to address the "troubling anomaly" in which "certain immigrants were in effect ... penalized for becoming citizens." *Id.* (quotation marks omitted). Importantly, however, the statute provides that "[r]egardless of whether" the beneficiary elects to convert the petition, "he or she may maintain [his or her original] priority date." 8 U.S.C. §1154(k)(3).

Section 1154(k) thus allows beneficiaries to opt out of the automatic conversion benefit and clarifies that, *whether or not* the beneficiary exercises that option, she retains her priority date. Section 1154(k) thus demonstrates that retention of priority date does *not* invariably accompany automatic conversion of the petition to a new category. *See also* 8 C.F.R §204.2(a)(4) (providing for priority date retention without automatic conversion); *id.* §204.2(h)(2) (same); *id.* §204.5(e) (same); *id.* §204.12(f)(1) (same); USA PATRIOT Act §421(c), Pub. L. No. 107-56, 115 Stat. 272, 357 (2001) (same).

2. The government further asserts that paragraph (h)(3) is ambiguous because "automatic conversion" supposedly cannot be made available to Respondents. The government is wrong.

a. The government contends that Respondents cannot take advantage of paragraph (h)(3)'s benefits because "there is no 'appropriate category' to which 'the alien's petition' ... can be 'converted.'" Pet. 16. Not so; F3 and F4 petitions listing derivative beneficiaries who have aged out can be converted to the F2B category for unmarried sons or daughters of LPRs.

The premise of the government's argument—that automatic conversion can only occur if petitions in the original and "converted" categories are filed by the same petitioner—is inconsistent with how Congress understood "automatic conversion" in subsection (h). Paragraph (h)(4) provides that "[paragraph (h)](3) shall apply to ... derivatives of self-petitioners." 8 U.S.C. §1153(h)(4). Under this provision, when a derivative beneficiary of an LPR self-petition filed pursuant to the Violence Against Women Act turns 21, the original petition (with her parent as petitioner) is automatically

converted into a self-petition (with herself as petitioner). *See* 8 U.S.C. §1154(a)(1)(D)(i)(III). Likewise, 8 C.F.R. §204.2(i)(1) provides for "[a]utomatic conversion of preference classification" when, *inter alia*, a U.S. citizen petitioner who filed for an alien spouse dies before the petition is approved. 8 C.F.R. §204.2(i)(1)(iv). In that situation, the earlier petition is treated as a "widow(er) petition" in which the alien becomes the petitioner.

Accordingly, nothing prevents an F3 or F4 petition from "automatically be[ing] converted to the appropriate [F2B] category," even though the LPR parent replaces the U.S. citizen relative as the petitioner. 8 U.S.C. §1153(h). Indeed, where a benefit is intended to be restricted to cases where the petitioner remains the same, the regulations have stated so explicitly. *See* 8 C.F.R. §204.2(a)(4). Congress did not so specify here.

b. The government also claims that Respondents' sons' and daughters' petitions cannot be converted under paragraph (h)(3) because doing so would run counter to the supposedly "well-understood meaning of the term 'convert[]'" (Pet. 18): "that a visa petition converts from one visa category to another ... without the need to file a new visa petition," *Wang*, 25 I. & N. Dec. at 35. This objection, however, is circular. The only reason that aged-out F3 and F4 derivative beneficiaries have thus far filed new petitions under the F2B category is because the government has erroneously withheld from them the automatic conversion benefit that the CSPA provides. The government cannot justify its interpretation of the statute by pointing to circumstances that only exist by virtue of that interpretation. *See King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 222 (1991) (rejecting similarly "circular reasoning"). Indeed, unlike other contexts such as conversion to a widow(er) peti-

tion (where the petitioner's death must be ascertained through information outside the immigration files), *see* 8 C.F.R. §204.2(i)(1)(iv), the government has all the information it needs to automatically convert an F3 or F4 petition into an F2B petition: the derivative beneficiary's age is listed on the original petition, and the government itself knows when the primary beneficiary becomes an LPR.

The government further contends (Pet. 17) that the conversion of F3 and F4 derivative petitions cannot occur "automatically" because "the aged-out person's parent might not submit an F2B petition" and because there is often a time lag between the date on which a visa becomes available to the parent and the date on which she receives LPR status. Again, however, nothing in the CSPA—as properly interpreted—requires the filing of a new petition on behalf of aged-out F3 and F4 derivative beneficiaries, as opposed to merely treating the prior petition as an F2B petition. And the government's concern about time lag results entirely from its mistaken assumption that "automatic" defines *when* conversion occurs, as opposed to simply *how* it occurs. As even the dissent below observed, "[a] process is 'automatic' if it is 'self-acting or self-regulating,' or occurs 'without thought or conscious intention.'" Pet. App. 30a (quoting *Webster's Third New International Dictionary* 148 (2002)). Nothing in that definition prevents the government from recognizing automatic conversion at the time the primary beneficiary becomes an LPR, in which case there is no time lag at all. And a system that automatically converted F3 and F4 petitions into F2B petitions when the primary beneficiary became an LPR could be done through a "self-acting" or "self-regulating" system; that the government has so far

failed to do so is a reason to enforce the CSPA, not for this Court to rewrite it.

The problems the government has identified (Pet. 17-18) at most demonstrate that paragraph (h)(3) does not set forth the particular mechanics the agency should use to implement the conversion. But a mere failure to specify a mode of implementation does not mean that implementation is *impracticable*, much less absurd; it certainly is not a reason to disregard clear statutory language or to find ambiguity where none exists. This is not to say that the Court need involve itself in the logistics of implementing the statute, which is the agency's role. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). But the fact that there are mechanisms available to the agency to administer the congressional mandate underscores that this is not the sort of "rare and exceptional circumstance[] ... where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.'" *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). Providing the benefits of automatic conversion and priority date retention for all derivative beneficiaries is far from being "so bizarre that Congress 'could not have intended it.'" *Id.* at 191.

C. The BIA's Interpretation Is Unreasonable

Even if the statute itself did not plainly resolve the question presented, the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and so not entitled to deference. *Chevron*, 467 U.S. at 843-844; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983).

The BIA's interpretation extends paragraph (h)(3)'s benefits to certain derivative beneficiaries who are closely related to two LPRs (the F2A sponsor and

the primary F2A beneficiary) but excludes all derivative beneficiaries who are closely related to at least one U.S. citizen and one LPR (the citizen sponsor and the LPR primary beneficiary). Nothing in *Wang* "tie[s], even if loosely," this decision to disfavor children with a demonstrated relationship to a U.S. citizen "to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2012). Ordinarily, the immigration laws adopt the opposite preference. *E.g.*, 8 U.S.C. §1153(a)(1)-(4) (making family-preference visas available to more categories of U.S. citizen-relatives than of LPR-relatives). The BIA's apparent desire to confine the CSPA's impact cannot justify such an arbitrary limit. 25 I. & N. Dec. at 38. And the BIA's only other rationale—consistency with past practice—is based on false premises. According to the BIA, (1) "the concept of 'retention' of priority dates has *always* been limited to" successive visa petitions filed by the same petitioner, and (2) "the term 'conversion' has *consistently* been used to mean" that the beneficiary "falls within a new classification without the need to file a new visa petition." *Id.* at 35 (emphases added). As explained above, however, sometimes a beneficiary retains her priority date or has her petition converted to a new classification with a new petitioner. *See supra* pp. 23-24. And there is no reason why derivative beneficiaries of non-F2A petitions would need to have a new F2B petition filed, as opposed to having the petition convert automatically to an F2B petition. *See supra* pp. 26-28. Thus, none of the BIA's explanations justifies arbitrarily withholding benefits from children who are demonstrably related to U.S. citizens while providing those benefits to children who are not.

In addition, the BIA's analysis in *Wang* is replete with analytical gaps and errors. The BIA failed to address the phrase "for the purposes of subsection (a)(2)(A) and (d)," which appears in both paragraphs (h)(1) and (h)(3), yet would receive different meanings in each section under the BIA's interpretation. *See* C.A. ER 505 (highlighting this text to the BIA). Nor does *Wang* acknowledge that paragraph (h)(3) cross-references the formula set forth in paragraph (h)(1). *See supra* pp. 15-16. The BIA simply pronounced, without explanation, that "the language of section 203(h)(3) does not expressly state which petitions qualify for" its benefits (*Wang*, 25 I. & N. Dec. at 33)—a proposition that even the panel below rejected (Pet. 50a-51a) and that the government does not press in its petition.

The BIA's consideration of priority-date retention and automatic conversion was equally flawed. *Wang* contains no analysis of whether priority-date retention and automatic conversion are independent benefits. And the BIA did not even acknowledge, much less distinguish, the examples that contradict its overstated conclusion about the consistency of past agency practice. *See supra* pp. 21-29.

Further, the BIA's interpretation conflicts with the government's instructions to LPRs about how to petition for a family-preference visa. *Wang* interprets the phrase "and (d)" in paragraph 1153(h)(3) to extend age-out protection to a single type of derivative beneficiary: the child of an LPR petitioner. But such a child can be a derivative beneficiary under subsection (d) only if the petitioner lists the child as a derivative beneficiary on a petition filed for a spouse; otherwise the child is a *primary* beneficiary under subsection (a)(2)(A), not a derivative beneficiary under subsection (d). Form I-130,

however, directs LPRs *not* to list children as derivative beneficiaries in this way, but instead to file a separate Form I-130 for each child as a *primary* beneficiary in the F2A category. *See* Instructions for Form I-130, Petition for Alien Relative, at 1 (stating that an LPR petitioner "*must* file a separate Form I-130 for each eligible relative" (emphasis added)), *available at* http://www.uscis.gov/files/form/i-130instr.pdf.[9] Thus, under the government's instructions, *none* of the aliens whom the government contends are eligible for age-out protection under paragraph (h)(3) as derivative beneficiaries would even be listed as derivative beneficiaries; they would be listed as primary beneficiaries on a separate F2A petition. *Wang* does not explain why Congress would have extended protection to a class that the agency's own instructions suggest should not exist.

In sum, *Wang* does not rationally connect its interpretation to the purposes of immigration law, its textual analysis is incomplete, its discussion of the regulatory context is incorrect, and it does not even analyze actual agency practice. Thus, even if the BIA's interpretation were not foreclosed by the statutory language, it should be rejected as unreasonable and arbitrary and

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[9] By contrast, the Form I-130 expressly permits an LPR petitioner to treat the unmarried, under-21 children of the petitioner's unmarried son or daughter as derivative beneficiaries by listing them on the same F2B petition as their parent. The same is true for U.S. citizen petitioners who seek to include the unmarried, under-21 children of their brother, sister, or married son or daughter as derivative beneficiaries of an F3 or F4 petition. *See* Instructions for Form I-130, at 1 (exempting such children from the separate-form requirement and stating that they "will be able to apply for an immigrant visa along with" their parent—*i.e.*, as a derivative beneficiary).

capricious. *See AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 387-388 (1999) (rejecting under *Chevron* an interpretation that was not "rationally related to the goals of" the statute); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (conditioning deference on "the thoroughness, validity, and consistency of an agency's reasoning"); *State Farm*, 463 U.S. at 43 (agency decision is arbitrary and capricious if agency "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence").

D. The Equities Support The Judgment Below

The government also asserts (Pet. 29-31) that the Ninth's Circuit's ruling produces inequity. But Congress has already balanced the equities. In enacting the CSPA, Congress concluded that parents should not be forced to immigrate separately from their children due to the mere passage of time and delay of visa availability, and children ought not to lose credit for the years they have already waited in line solely because they reach adulthood. *See supra* pp. 18-20. The Ninth Circuit's holding will not result in Respondents' children receiving visas before anyone whose petition was filed earlier than theirs; it only means that they will receive credit for their long wait, as Congress directed, rather than having it reset to zero, as the government now insists.[10]

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[10] The government cites (Pet. 31) an idiosyncratic example from a student note, but the example actually illustrates how aged-out beneficiaries only ever receive visas ahead of aliens who have been waiting in line for *less* time. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199,

The fact that obeying Congress's mandate would require the agency to "reshuffl[e]" its lists (Pet. 31) is a construct of the government's own making. Had the agency complied with Congress's instructions in 2002, no change would now be needed. Respondents sympathize with all who are seeking to immigrate to the United States and have been frustrated with the pace of the process. But in a system that favors those who wait patiently in line, Respondents' children are no less deserving than anyone else who has waited as long as they have.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

2235 (2012) ("Alice's son," who has been the subject of a petition since 1994, receives a visa before "Rose's daughter," who has only been waiting since, at the earliest, 2000).

[11] Moreover, the pending immigration reform bill guarantees that a visa be made available by 2021 (or sooner) to any petitioner whose family-based petition is currently pending, S. 744, 113th Cong., §2302—a provision that would diminish the impact of any supposed "reshuffling."

Respectfully submitted.

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MAY 2013

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court U.S.
FILED
JUN 3 - 2013
OFFICE OF THE CLERK

No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Over a five-judge dissent, the en banc Ninth Circuit rejected the BIA's reasonable interpretation of 8 U.S.C. 1153(h), which is entitled to *Chevron* deference, and held that the statute unambiguously grants a special immigration preference to all persons seeking immigrant visas who have "aged out" of derivative beneficiary status. Pet. App. 3a, 24a. Respondents do not deny that the circuits are split as to the proper interpretation of Section 1153(h)(3) or that the question presented here is important. Rather, they contend (Br. in Opp. 13-15) that the Court should not resolve the question because pending legislation could address it, the case involves a nationwide class, and the court below reached the correct result. Those contentions lack merit. The provision in a pending Senate bill that respondents cite has not yet even been considered by the full Senate, the fractured state of

the current law creates serious difficulties and inequities, and the decision below wrongly holds a statutory provision that has been the subject of considerable judicial disagreement to be wholly without ambiguity. This Court's review is necessary to clarify the proper interpretation of Section 1153(h)(3)—an issue that significantly affects not only respondents and similarly situated parties seeking relief under Section 1153(h)(3), but also the many thousands of other aliens awaiting immigrant visas.

A. Interpretation Of Section 1153(h)(3) Is An Important Issue

As an initial matter, the mere existence of an unenacted bill addressing the proper treatment of aged-out beneficiaries does not counsel against this Court's review. Respondents correctly state (Br. in Opp. 13) that the Senate Judiciary Committee has reported to the full Senate a bill that amends Section 1153(h)(3). But that bill is not the law of the land: it has not been approved by the full Senate, let alone gained the approval of the House of Representatives. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). And the particular provisions to which respondents point obviously could be deleted or altered while the bill is under consideration. If Section 1153(h)(3) were ultimately amended in a way relevant to this case, this Court could address the new law as necessary in the course of its review.[1]

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[1] Even if the provisions cited by respondents in the Senate bill did become law, it is not clear whether respondents would be directly affected. See S. 744 § 2305(e) ("The amendments made by this section shall take effect on the date of the enactment of this

As the law stands, the need for review is patent. While acknowledging that the circuits are divided, respondents emphasize that the district court in this case "certified a nationwide class." Br. in Opp. 13. The fact that the decision below would have sweeping effects, however, hardly diminishes the need for this Court's review. To the contrary, the district court's decision to certify an expansive class makes this case particularly significant. See 8:08-cv-00688 Docket entry No. (Docket entry No.) 74, at 21 (C.D. Cal.) (certifying class of "[a]liens who became lawful permanent residents as primary beneficiaries" of F3 and F4 petitions that "list[ed] [the aliens'] children as derivative beneficiaries" and who "subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters").

Indeed, as the petition explains (Pet. 28), implementation of the Ninth Circuit's decision would likely require a fundamental overhaul of the immigrant visa system. That kind of change would be difficult to implement and would undoubtedly result in harm to some waiting families, including families who have been separated for longer than respondents have been separated from their adult sons and daughters. See Pet. 28-32; contra Br. in Opp. 14, 33-34.

Moreover, the Ninth Circuit's decision, while sweeping, does not encompass every person in the country potentially affected by Section 1153(h)(3). First, the class includes only aged-out persons whose parents were primary beneficiaries of F3 and F4 petitions, and not those whose parents were primary beneficiaries of family-preference petitions in a different

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Act."); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270, 280 (1994).

category.[2] Second, the class does not cover aged-out derivative beneficiaries of employment-based immigrant visa petitions who may seek to invoke Section 1153(h)(3). See Pet. 29 n.6 (explaining that employment-based visa petitions operate similarly to family-preference petitions and are covered by Section 1153(b)). Third, the district court limited the class temporally so that it sweeps in only aliens who have already taken certain actions. Docket entry No. 74, at 21 (including in the class those who "*became* lawful permanent residents as primary beneficiaries" and "who subsequently *filed* second-preference petitions") (emphasis added); see *id.* at 5-8 (rejecting definition of class that would have operated prospectively). As a result, the disagreement among the circuits remains salient.[3]

B. The Decision Below Is Incorrect

Respondents argue at length (Br. in Opp. 15-33) that the decision below is correct. Those arguments can and should be fully addressed in the parties' merits briefs. Nevertheless, respondents' various efforts

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[2] Compare Br. in Opp. 14 n.5 (suggesting that the government accepts that "the decision below governs F1 and F2B petitions") with Pet. 29 (explaining only that the Ninth Circuit's decision governing beneficiaries of F3 and F4 petitions would affect the *waiting lines* "for F1, F2B, and F3 visas" because aged-out persons would enter those lines or obtain earlier priority dates within them).

[3] Indeed, without this Court's intervention, this case could produce an unusual situation in which similarly situated persons within a single circuit (such as the Second Circuit, which has concluded that Section 1153(h)(3) unambiguously precludes relief for parties like respondents, see *Li* v. *Renaud*, 654 F.3d 376, 379-380, 385 (2011)) may be subject to different treatment, depending on whether they are members of the class.

to establish that Section 1153(h)(3) unambiguously entitles them to the relief they seek are unavailing.

First, respondents point (Br. in Opp. 15-16) to the cross-references within Section 1153(h) on which the en banc majority relied. See Pet. App. 15a-16a. But respondents do not attempt to grapple with the argument set forth in the petition with respect to those cross-references. See Pet. 19. As the petition explains, there is no question that a person can obtain relief under paragraph (h)(3) only if she is a beneficiary of a petition identified in paragraph (h)(2), has been subjected to the formula in paragraph (h)(1), and has had her age computed as 21 or older. See *ibid.* But that does not mean that *everyone* who meets those conditions necessarily qualifies for the further benefit set forth in paragraph (h)(3). Rather, given that paragraph's requirement that an "appropriate category" exist to which the petition can "automatically be converted" when the age calculation is made, paragraph (h)(3) can reasonably be (and is most sensibly) understood to cover only a subset of beneficiaries of the petitions that paragraph (h)(2) describes. 8 U.S.C. 1153(h)(2) and (h)(3). That reading of the statute does not treat similar language in paragraphs (h)(1) and (h)(3) inconsistently (see Br. in Opp. 16); rather, it takes account of paragraph (h)(3)'s reference to paragraph (h)(1), while giving meaning and force to all parts of Section 1153(h). See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Had Congress wished to extend paragraph (h)(3)'s benefits to all derivative beneficiaries, it could have easily done so in a far more straightforward way. See, *e.g.*, 8 U.SC. 1151(f),

1158(b)(3)(B) (treating age of a child as frozen for various purposes to avoid aging-out problem).[4]

Second, respondents rely heavily (Br. in Opp. 21-26) on the argument that Section 1153(h)(3) makes "conver[sion]" and priority-date retention independent benefits, such that an aged-out derivative beneficiary who does not qualify for "automatic[]" conversion may nevertheless be entitled to "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3). The en banc majority did not adopt that argument, and respondents do not identify any court that has accepted it—but the Second Circuit has rejected it in no uncertain terms, explaining that "Section 1153(h)(3) requires both automatic conversion to the appropriate category and retention of the original petition's priority date" and does not apply unless "conversion [is] possible." *Li*, 654 F.3d at 383-384; see also *Matter of Wang*, 25 I. & N. Dec. 28, 33-34, 36 (B.I.A. 2009) (explaining that "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion *and* retention of priority dates") (emphasis added).

The Second Circuit's reading is correct. If the statute simply provided that "the alien's petition shall automatically be converted to the appropriate catego-

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[4] Respondents' discussion of the title of the provision in which Section 1153(h) was enacted (Br. in Opp. 16-17) adds nothing to the analysis. That title, which speaks only in general terms and "cannot limit the plain meaning of the text," *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001), makes clear that some sons and daughters should benefit, but does not specify which ones, Child Status Protection Act, Pub. L. No. 107-208, § 3, 116 Stat. 928 (referring to "Certain Unmarried Sons and Daughters").

ry," it would be unclear whether the converted petition should retain the original priority date or should be given a new priority date corresponding to the date of the conversion. The last clause of Section 1153(h)(3) provides the necessary clarification, rather than conferring some independent benefit—and Section 1153(h)(3) therefore is most naturally read to say that the priority date of the "original petition" shall be "retain[ed]" *when* the conversion takes place, assuming that an "appropriate category" exists and a conversion is possible. 8 U.S.C. 1153(h)(3). That interpretation is bolstered (not undermined, see Br. in Opp. 23) by the provision's statement that it is "the alien" who "shall retain the original priority date." 8 U.S.C. 1153(h)(3). In the absence of conversion of "the alien's petition," the statement would be nonsensical: a priority date is a feature of a petition, and a person ("the alien") who is no longer the proper subject of any petition, due to aging out of "child" status, cannot herself be the bearer of any such date. Section 1153(h)(3) makes sense only if "the alien" retains the original priority date in connection with a converted petition.[5]

As the Second Circuit explained, when Congress wanted to provide for priority-date retention in the absence of conversion of a petition, it did so expressly,

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[5] In this context, respondents' statements about the meaning of the word "and" (Br. in Opp. 22-23) are irrelevant. See *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012). In any event, the bankruptcy provision addressed in *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), cited in Br. in Opp. 22, has no bearing here, since it provides two benefits that operate independently and makes clear through use of the word "any" that the second benefit may not apply in a given case. See 489 U.S. at 241-242 (discussing 11 U.S.C. 506(b)).

as in 8 U.S.C. 1154(k). See *Li*, 654 F.3d at 383. Respondents' reliance (Br. in Opp. 25-26) on the proposition that Section 1154(k) "demonstrates that retention of priority date does *not* invariably accompany automatic conversion" therefore misses the point. The existence of statutory language in which Congress quite clearly made priority-date retention a separate benefit (and explained how the priority date could continue to attach to an operative petition in the absence of conversion, see 8 U.S.C. 1154(k)(2)-(3)) underscores the absence of any such language in Section 1153(h)(3). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[6]

Third, respondents contend (Br. in Opp. 26) that automatic conversion is available to aged-out derivative beneficiaries of F3 and F4 petitions, because such petitions "can be converted to the F2B category for unmarried sons or daughters of" lawful permanent residents. But that is, to say the least, a strained reading of the operative text. See Pet. 16-17. Section 1153(h)(3) provides that "the alien's petition" shall be "automatically converted," 8 U.S.C. 1153(h)(3)—that is, that an existing petition will move from one family-preference category to another, as if (for example) the

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[6] Respondents also argue (Br. in Opp. 24), contrary to *Wang*, that the "the concept of 'retention' of priority dates" is not "limited to a situation in which there was a successive petition filed by the same petitioner." But respondents' examples prove that *Wang* is correct. Where the regulations provide that an old priority date attaches to the filing of a new petition by a new petitioner, their text sets forth terms other than "retention" or "retain" (except for one regulation involving the distinct situation of employment-based petitions filed by interchangeable employers that both have the same relationship with the beneficiary). See *id.* at 24; see also 8 C.F.R. 204.12(f).

label "F2A" on that petition were replaced with the label "F2B." Such automatic conversion is possible when the existing petition is valid and the petitioner does not change, because someone empowered to file a petition in the newly "appropriate category," 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(a)(1)-(4), has already taken the necessary action. But an F3 or F4 petition by a now aged-out person's grandparent, aunt, or uncle cannot be "automatically converted" into an F2B petition by the aged-out person's *parent* (see Pet. 16-17)—someone who had never previously even qualified to file a petition. Indeed, no conversion can possibly take place until that parent becomes a lawful permanent resident and decides to file a petition naming the aged-out person as a beneficiary. Those things may never occur at all, but at the very least require a number of affirmative steps on the part of both the parent and the government. See Pet. 16-18. That is the opposite of respondents' own definition of "automatic." Br. in Opp. 28.[7]

Fourth, respondents assert (Br. in Opp. 17-20) that Congress intended Section 1153(h)(3) to have a broad reach. But it would be curious indeed for Congress to

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[7] The situations that respondents cite (Br. in Opp. 26-27) to support their understanding of automatic conversion do not aid their cause. If Section 1153(h)(3) meant what respondents say it does, then Congress would not have later specified separately that the provision should be deemed to cover "derivatives of self-petitioners" under the Violence Against Women Act of 1994. 8 U.S.C. 1153(h)(4); see 8 U.S.C. 1154(a)(1)(D)(i)(I) and (III) (providing that no new petition need be filed for an aged-out derivative beneficiary of such a self-petition). Also, 8 C.F.R. 204.2(i)(1)(iv) involves a situation in which a petition filed by a widow or widower is based on the same spousal relationship with a U.S. citizen as a prior petition.

revamp the visa allocation system, causing upheaval for tens of thousands of waiting aliens and their families, with virtually no discussion of the issue. It is more likely that Congress, which was focused on the administrative delays in petition approval addressed by Section 1153(h)(1), see *Wang*, 25 I. & N. Dec. at 36; cf. 8 U.S.C. 1151(f), 1158(b)(3), intended in Section 1153(h)(3) to take the more modest step of codifying an existing regulatory practice while also providing a limited additional benefit not already found in the regulation itself. See Pet. 19-22; *Matter of Wang*, Decision on Mot. for Recons. 3 (No. A088 484 947 May 21, 2010).

The floor statements that respondents cite (Br. in Opp. 18-19) do not establish otherwise. Those statements—which are weak evidence of congressional intent at best, see *Graham County Soil & Water Conserv. Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1408 (2010)—are so general as to be unhelpful in choosing between competing interpretations of Section 1153(h)(3). See Br. in Opp. 18 (citing statements by individual legislators that it is good to bring families together); *id.* at 19-20 (citing statement of Sen. Feinstein, made in connection with earlier bill that was not enacted, that one aspect of aging-out problem to be addressed is "growing immigration backlogs in the immigration visa category"). They therefore do not render the text of the statute unambiguous.

Finally, respondents attack the BIA's decision in *Wang* (Br. in Opp. 29-33). That attack largely echoes respondents' argument that they have identified the only possible construction of Section 1153(h)(3), and is equally without merit. The Board gave Section

1153(h)(3) a close and careful reading, and considered the whole statutory and regulatory scheme relevant to the interpretation of that provision (including the use of the terms "retention" and "conversion" in the pertinent statutes and regulations, which the Board correctly described). See *Wang*, 25 I. & N. Dec. at 30-39; see also *Wang*, Decision on Mot. for Recons. 1-4. In light of the text and the purpose of Section 1153(h)(3), as well as Congress's choice not to provide any preference for grandchildren, nieces, or nephews of U.S. citizens, the Board rationally concluded that adult sons and daughters of lawful permanent residents like those involved in this case—capable of carrying on lives independent from their parents—should not be entitled to jump ahead of others who have been patiently waiting in line. See *Wang*, 25 I. & N. Dec. at 38-39.[8] Accordingly, as the en banc dissenters stated, the Board's decision is a reasonable one that should have been accorded *Chevron* deference and sustained. See Pet. 23-24; Pet. App. 34a-35a.

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[8] Respondents' suggestion (Br. in Opp. 31-32) that the BIA's analysis conflicts with an instruction on a government form is incorrect; that instruction does not preclude a petitioner from listing a spouse as a primary beneficiary and a child as a derivative beneficiary, and the practice is common because it "save[s] filing fees." Pet. App. 57a n.6; see 8 C.F.R. 204.2(a)(4).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JUNE 2013

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the principal beneficiary. The principal beneficiary's "spouse or child" may be a derivative beneficiary of the petition, "entitled to the same status[ ] and the same order of consideration" as the principal beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 ("age out"), and therefore lose "child" status, after the filing of visa petitions as to which they are beneficiaries.

The questions presented are:

1. Whether Section 1153(h)(3) unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the principal beneficiary.

2. Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) to grant special priority status only to certain aliens.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services; Janet Napolitano, Secretary of the Department of Homeland Security; Lynne Skeirik, Director, National Visa Center; Kathy A. Baran, Director, California Service Center, U.S. Citizenship and Immigration Services; and John Kerry, Secretary of State.

Respondents, who were plaintiffs in the district court and appellants in the court of appeals, are Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, Norma Uy, Ruth Uy, and Teresita G. Costelo and Lorenzo P. Ong, individually and on behalf of a class of others similarly situated.

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In the Supreme Court of the United States

No. 12-930

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-35a) is reported at 695 F.3d 1003. The vacated opinion of the court of appeals panel (Pet. App. 36a-60a) is reported at 656 F.3d 954. One opinion of the district court (Pet. App. 61a-78a) is reported at 663 F. Supp. 2d 913; the other (Pet. App. 79a-84a) is not published in the Federal Supplement, but is available at 2009 WL 4030516.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 26, 2012. On December 18, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013, and the petition was filed on that date. The

petition was granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

This case concerns the proper interpretation of 8 U.S.C. 1153(h)(3), which addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, after another person has filed a visa petition as to which the alien is a beneficiary.

1. a. Under the INA, United States citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of an alien lawfully admitted for permanent residence. The INA limits the total number of family-sponsored immigrant visas issued each year, see 8 U.S.C. 1151(c); establishes various "preference" categories that classify and prioritize different types of family members, see 8 U.S.C. 1153(a); caps the number of visas that may be issued in each of those categories each year, see *ibid.*; and places annual limitations on the number of nationals of any single foreign state who can obtain visas in each category, see 8 U.S.C. 1152(a)(2).

The INA establishes the following "preference" categories for family-sponsored ("F") visas:

F1: unmarried sons or daughters (age 21 or older) of U.S. citizens

F2A: spouses or children (unmarried and under age 21) of lawful permanent resident aliens

F2B: unmarried sons or daughters (age 21 or older) of lawful permanent resident aliens

F3: married sons or daughters of U.S. citizens

F4: brothers or sisters of U.S. citizens

See 8 U.S.C. 1153(a)(1)-(4); see also 8 U.S.C. 1101(b)(1) (definition of "child").[1]

A citizen or lawful permanent resident alien seeking an immigrant visa for a family member in one of those categories must file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS).[2] See 8 U.S.C. 1154(a)(1); 8 C.F.R. 204.1(a)(1); USCIS, Form I-130, *Petition for Alien Relative* (Dec. 18, 2012), http://www.uscis.gov/files/form/i-130.pdf. The family member sponsored by the petitioner is known as the principal (or primary) beneficiary.

When a petition is filed, USCIS assesses it and—if it meets applicable requirements—approves it. 8 U.S.C. 1154(b). That approval does not result in immediate issuance of a visa to the principal beneficiary, however.

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[1] Petitions by U.S. citizens on behalf of an "immediate relative"—that is, a spouse, child (unmarried and under age 21), or parent, see 8 U.S.C. 1151(b)(2)(A)(i)—are not considered "preference" petitions and are subject to fewer restrictions. The INA also permits the issuance of immigrant visas to aliens in employment-based categories, see 8 U.S.C. 1151(d), 1153(b), and aliens from countries with historically low immigration rates to the United States, see 8 U.S.C. 1153(c).

[2] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to DHS. Some residual statutory references to the Attorney General pertaining to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

Rather, the principal beneficiary receives a place in line to wait for a visa number to become available. Within family-preference categories, the order of the line is determined by the petition's priority date—that is, the date when it was filed with the agency. See 8 U.S.C. 1153(e); 8 C.F.R. 204.1(b); 22 C.F.R. 42.53(a).

Every month, the Department of State publishes a visa bulletin with various cut-off dates for each family-preference category. See 8 C.F.R. 245.1(g)(1); 22 C.F.R. 42.51. When the applicable cut-off date is later than the petition's priority date, the priority date is "current," and a visa is available. In order to obtain the visa and become a lawful permanent resident alien, the principal beneficiary must submit an application, pay fees, demonstrate continued eligibility and admissibility, and complete consular processing (if abroad) or obtain adjustment of status (if present in the United States). See 8 U.S.C. 1153(g), 1201(a), 1255.

Given the annual limitation on the total number of visas that may be granted for a particular family-preference category (as well as separate limitations on the number of nationals of a single foreign country who may receive visas in any given year), the waiting line for visa availability is often quite long. For instance, Filipino F4 principal beneficiaries (brothers and sisters of U.S. citizens) whose priority dates are now current have been waiting for more than 20 years. See U.S. Dep't of State, *Visa Bulletin for Aug. 2013* (July 8, 2013), http://travel.state.gov/visa/bulletin/bulletin_6028.html (*Visa Bulletin for Aug. 2013*).

A principal beneficiary of a preference petition with a current priority date can also aid certain "derivative" beneficiaries—the principal beneficiary's spouse and

unmarried children under age 21.[3] Derivative beneficiaries are "entitled to the same status[] and the same order of consideration provided" to the principal beneficiary with respect to a pending petition. 8 U.S.C. 1153(d) (describing derivative beneficiaries as "accompanying or following to join[] the spouse or parent"). Accordingly, if a visa number is available to a principal beneficiary, it is available to a derivative beneficiary as well. See *ibid.*

By the time the principal beneficiary's priority date becomes current, however, an alien who qualified as a "child" derivative beneficiary when the petition was filed may have "aged out"—that is, reached or passed his or her twenty-first birthday. See 8 U.S.C. 1101(b)(1). If that happens, the aged-out alien cannot claim derivative-beneficiary status. See 8 U.S.C. 1153(d), 1154(e). A principal beneficiary of an F2A petition, which may be filed by a lawful permanent resident on behalf of a "child," can also age out in the same way.

b. In 2002, Congress enacted the Child Status Protection Act (CSPA or Act), Pub. L. No. 107-208, 116 Stat. 927. The CSPA contains a number of different provisions addressing the treatment of children (and adult sons and daughters) under the immigration laws. In Section 3 of the CSPA, 8 U.S.C. 1153(h), Congress modified the visa system to grant relief to certain aged-out aliens.

Section 1153(h)(1) addresses the passage of time between the filing of an immigrant visa petition and agency approval of the petition, while also eliminating from the age calculation any delay associated with the adjudication of the primary beneficiary's subsequent applica-

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[3] No derivative beneficiaries are permitted with respect to an immediate-relative petition filed by a U.S. citizen. See 8 U.S.C. 1153(d).

tion for permanent residency after a visa number becomes available. It provides that "a determination of whether an alien satisfies the age requirement * * * shall be made using * * * the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), * * * reduced by * * * the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. 1153(h)(1); see *ibid.* (conditioning the applicability of this provision on the alien having "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of [visa] availability"); see also *Martinez* v. *DHS*, 502 F. Supp. 2d 631, 636 (E.D. Mich. 2007) (explaining that prior to enactment of Section 1153(h)(1), the relevant date for purposes of determining an alien's qualification for "child" status was the date of adjudication of an "application for permanent residency").

Section 1153(h)(2), to which Section 1153(h)(1) refers, describes a set of relevant petitions. It states that "[t]he petition described in this paragraph is" an F2A petition naming a child as a principal beneficiary, or any petition that includes a child as a derivative beneficiary and the child's parent as a principal beneficiary. 8 U.S.C. 1153(h)(2); see 8 U.S.C. 1153(a)(2)(A) (providing for F2A petitions); 8 U.S.C. 1153(d) (providing that a "child" may be a derivative beneficiary of various petitions).

Together, these provisions permit certain beneficiaries who have reached or passed the age of 21 to nevertheless retain "child" status for purposes of the priority date for visa availability. For example, if USCIS took three years to approve a visa petition filed when an alien

was age 18 and "an immigrant visa number became available" one year after approval, 8 U.S.C. 1153(h)(1), an alien who met the requirements of Section 1153(h)(1) would be treated for purposes of the visa eligibility as if he were 19 years old rather than 22 years old.

Section 1153(h)(3), which is the subject of this case, addresses the situation of an alien who no longer qualifies as a "child," even after application of Section 1153(h)(1)'s age-reduction formula. It provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3).

c. The Board of Immigration Appeals (Board or BIA) interpreted Section 1153(h)(3) in its precedential decision in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), a case that helps illustrate how the visa preference system operates in practice. Wang was the principal beneficiary of an F4 petition filed by his sister, a U.S. citizen. See *id.* at 29; 8 U.S.C. 1153(a)(4). When the F4 petition was filed, Wang's daughter was a minor and thus qualified as a derivative beneficiary of the petition under 8 U.S.C. 1153(d). The petition was approved after a short while, and Wang waited for a visa number to become available. Approximately a decade later, Wang received a visa and was admitted to the United States as a lawful permanent resident. See *Wang*, 25 I. & N. Dec. at 29. By that time, however, his daughter was over 21 (even subtracting the small amount of time between the filing of the F4 petition and its approval), and she no longer qualified for derivative-beneficiary treatment. See *id.* at

32; see also 8 U.S.C. 1101(b)(1) (definition of "child"); 8 U.S.C. 1153(d) (identifying derivative beneficiaries to include the "child" of the principal beneficiary).

Wang then filed a new petition with USCIS on behalf of his daughter—an F2B petition, in the category that covers filings by lawful permanent residents on behalf of their unmarried sons and daughters who are age 21 or older. See 8 U.S.C. 1153(a)(2)(B). Immigration authorities approved the F2B petition filed by Wang on behalf of his daughter, but gave it a priority date corresponding to the date on which it was filed, not the date on which the earlier F4 petition had been filed by Wang's sister on behalf of Wang himself. See *Wang*, 25 I. & N. Dec. at 29.

The Board rejected the argument that Section 1153(h)(3) dictated that the priority date be the earlier date on which Wang's sister filed the visa petition. The Board explained that "the language of section [1153](h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Wang*, 25 I. & N. Dec. at 33. The Board further explained that "[i]n immigration regulations, the phrase 'automatic conversion' has a recognized meaning," which includes a requirement that the petitioner be the same before and after conversion. *Id.* at 34 (citing, *inter alia*, 8 C.F.R. 204.2(i)); see *id.* at 35 ("Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). The Board concluded that Congress had enacted Section 1153(h) in 2002 consistent with the accepted understanding of that term, discerning nothing in the legislative history of the CSPA signaling an intent to give special priority status to derivative beneficiaries who age out of "child" status as a consequence of statu-

tory limits on the number of visas issued each year as opposed to administrative delays in USCIS's approval of the initial visa petition or in the subsequent adjudication of a visa application. *Id.* at 37-38.

The Board therefore held that Section 1153(h)(3) did not grant Wang's daughter a special benefit in the form of an advanced priority date. See *Wang*, 25 I. & N. Dec. at 38-39. The earlier F4 petition had been filed by Wang's sister, who had no relationship with Wang's adult daughter that would qualify her for a visa—that is, there is no family-preference category for nieces (or nephews) of U.S. citizens. Thus, the petition filed by the aunt could not automatically convert to an existing category for the benefit of Wang's adult daughter, and her original priority date could not be "retain[ed]" with respect to the new F2B petition filed by Wang rather than by the aunt. See *id.* at 35-36; see also *id.* at 36 (explaining that a broader reading would mean that "as long as a parent gains status under any preference category, all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future").[4]

2. This case arises out of suits filed by two groups of plaintiffs in federal district court in 2008 claiming that immigration authorities incorrectly denied relief under Section 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions. The first suit was brought by parents who were principal beneficiaries of F3 and F4 petitions filed in the 1980s and 1990s, and who sought to

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[4] The Board reaffirmed its conclusions in a decision denying a motion for reconsideration. See *Matter of Wang*, No. A 088 484 947, 2010 WL 9536039 (B.I.A. May 21, 2010).

retain the priority dates of those petitions with respect to F2B petitions they later filed on behalf of their adult sons and daughters. See Pet. App. 11a-12a, 68a-69a; see also *id.* at 68a-69a (noting that some of the sons and daughters also joined the suit as plaintiffs).

The second suit was brought by similarly situated parents seeking to benefit their aged-out sons and daughters by forcing the government to assign priority dates from decades-old F3 and F4 petitions to new F2B petitions. Pet. App. 11a-12a, 44a. In that case, the district court certified a class consisting of "[a]liens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for whom [petitioners] have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3)." *Id.* at 81a.

The district court granted summary judgment to the government in both cases. Noting that "[t]he factual circumstances of these cases are similar to those in *Wang*," the court concluded that Section 1153(h)(3) is ambiguous and held that the Board's interpretation of that provision in *Wang* was reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 68a, 72a, 83a.

3. The cases were consolidated for appeal, see Pet. App. 45a, and a Ninth Circuit panel unanimously affirmed the judgments in favor of the government, see *id.* at 60a. The panel found Section 1153(h) ambiguous and deferred to the Board's interpretation of the provision.

The panel rested its holding on a close reading of Section 1153(h)(3) and related provisions. The panel explained that Section 1153(h) could be read to apply to

all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person age 21 or older because in order to obtain such a preference it would be necessary for a different petitioner to file a new petition. Pet. App. 50a-54a; see *id.* at 54a-55a (explaining that it is "certainly possible" to read Section 1153(h)(3) as granting priority date retention only where automatic conversion is also available). The panel concluded that *Chevron* deference to the Board's interpretation was appropriate. In the panel's view, the Board's reading of Section 1153(h)(3) "accords with the ordinary usage of the word 'automatic' to describe something that occurs without requiring additional input, such as a different petitioner," and represents "a reasonable policy choice for the agency to make." *Id.* at 57a-60a (quoting *Chevron*, 467 U.S. at 845).

4. a. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a 6-5 decision. The majority concluded that "the plain language of the [Act] unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries" and that the Board's contrary interpretation "is not entitled to deference." Pet. App. 3a; see *id.* at 24a ("Automatic conversion and priority date retention are available to all visa petitions identified in [Section 1153](h)(2).").

The majority relied primarily on cross-references between the various paragraphs of Section 1153(h). Section 1153(h)(1) sets forth a formula that calculates whether an alien's age is 21 or older for purposes of the applicable "age requirement," and applies to petitions

described in Section 1153(h)(2); the "petition[s] described in [that] paragraph" are F2A petitions under 8 U.S.C. 1153(a)(2)(A) naming a child as a principal beneficiary and any petitions as to which a child is a derivative beneficiary under 8 U.S.C. 1153(d). 8 U.S.C. 1153(h)(1)-(2). While Section 1153(h)(3) does not refer to paragraph (h)(2), it does refer to paragraph (h)(1), because it applies only if "the age of an alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). Because "[paragraph] (h)(3) * * * cannot function independently," and "[paragraph] (h)(1) explicitly applies to the visas described in [paragraph] (h)(2)," the majority concluded that Congress had clearly provided that paragraph (h)(2) defines which petitions are covered by paragraph (h)(3). Pet. App. 15a-16a. Accordingly, the majority continued, "both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries may automatically convert to a new appropriate category (if one is available)" and "retain the priority date of the original petitions for which they were named beneficiaries." *Id.* at 16a.

Having determined that the statutory language was clear, the majority addressed what it identified as questions of "impracticability" concerning the availability of automatic conversion under its reading of Section 1153(h). Pet. App. 19a-23a (citing *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). The majority acknowledged that "[f]or an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner"—the aged-out person's parent, assuming that after the parent's visa number becomes available she is granted lawful permanent resident status and thus becomes eligible to and chooses to file a petition for her adult son or daughter. *Id.* at 18a.

The majority also acknowledged that it could take some time for a new F2B petition to be filed, and indeed that such a petition might never be filed. See *id.* at 21a-22a & n.4. But the majority did not believe that those issues "render[ed] automatic conversion impracticable" and retention of the original priority date therefore unavailable as a statutory matter. *Id.* at 21a. Rather, the majority characterized those issues as merely "present[ing] administrative complexities that may inform USCIS's implementation." *Id.* at 22a; see *id.* at 21a-22a (stating that such complexities include "[t]he lag time while a parent receives his visa and adjusts status" to become a lawful permanent resident and "the possibility that conversion for an aged-out derivative is never possible"). Finally, the majority believed that its reading made more sense than the Board's narrower interpretation because, in the majority's view, Congress likely did not intend to benefit only a small category of aged-out persons and "barely modif[y] the regulatory regime that existed at the time the [Act] was enacted." *Id.* at 22a-23a (citing 8 C.F.R. 204.2(a)(4)).

The majority acknowledged that its ruling would have a substantial adverse effect on aliens who are not covered by Section 1153(h)(3). Thus, the majority noted, if aged-out beneficiaries are permitted to "retain their priority dates when they join new preference category lines," that "will necessarily impact the wait time for other aliens in the same line," who will suddenly find more people ahead of them in the quest for visas that are made available only in small, "statutorily fixed" numbers. Pet. App. 23a. The majority did not attempt to assess the significance of that result or to read the language of the statute in light of it. See *ibid.*

b. Five judges dissented in an opinion authored by Judge Milan Smith, Jr. The dissent agreed that Section 1153(h)(3) could be read to "include F3 and F4 derivative beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2)." Pet. App. 27a-28a. But in the dissent's view, such a reading could not be squared with three other aspects of Section 1153(h)(3): "(1) that a petition must be converted 'to the appropriate category;' (2) that only 'the alien's petition' may be converted; and (3) that the conversion process has to occur 'automatically.'" *Id.* at 28a. Automatic conversion is not possible, the dissent explained, because "[t]he children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own." *Id.* at 29a. The dissent further reasoned that although the majority relied on the assumption that the aged-out person's parent would become a lawful permanent resident and file a new F2B petition naming that person, such a filing may not happen for some time or at all, and "[a]n action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at 30a. The dissent thus criticized the majority for "ignoring statutory language contrary to its interpretation before finding the plain meaning clear." *Id.* at 28a, 31a-32a.

Finally, the dissent recognized the real-world implications of the majority's ruling, which would "shuffle the order in which individual aliens get to immigrate" and result in a substantial increase in many aliens' already

protracted wait times for visas. Pet. App. 34a-35a. "If F3 and F4 derivative beneficiaries can retain their parents' priority date," the dissent noted, "they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship." *Id.* at 35a.[5]

SUMMARY OF ARGUMENT

The Ninth Circuit erred in ruling that Section 1153(h)(3) unambiguously extends a special priority status to aged-out former derivative beneficiaries of F3 and F4 immigrant-visa petitions and definitively forecloses the Board's narrower interpretation. Rather, as the Board recognized, Section 1153(h)(3) is sensibly read to grant a special priority only to aliens whose petitions can "automatically be converted" from one "appropriate" family-preference "category" to a different one without the need for a new petitioner and a new petition, 8 U.S.C. 1153(h)(3)—a group that does not include respondents' children (and others like them). The Board's reasonable construction of the provision merits *Chevron* deference, which is "especially appropriate in the immigration context." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

First, the Ninth Circuit's conclusion that Section 1153(h)(3) has an unambiguously broad scope cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. 1153(h)(3). That state-

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[5] The court of appeals stayed its mandate pending this Court's disposition.

ment contains a number of discrete requirements: that the petition as to which the alien was a beneficiary prior to aging out is the only petition eligible for conversion; that the transformation of the petition is of a limited nature, consisting only of movement from one valid and appropriate category to another; and that the conversion must take place automatically, without gaps in time or external events like the intervention of a new petitioner.

All of those requirements are readily satisfied with respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers. But the requirements cannot be met with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which an aged-out alien was formerly entitled to derivative status as a child. No "appropriate category" exists under which the original F3 or F4 petitioner could petition for an aged-out former derivative beneficiary—that is, the petitioner's grandchild, niece, or nephew. And while the aged-out person's own parent might at some point qualify as a lawful permanent resident who could file an F2B petition for his or her adult son or daughter, the shift from an F3 or F4 petition to a new F2B petition that might possibly be filed at some later point by a different person, depending on how various contingencies are resolved, cannot reasonably be characterized as an "automatic[] * * * conver[sion]" of "the alien's petition."

That interpretation of the conversion language of Section 1153(h)(3) is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in regulations in place when the CSPA was enacted. In particular, the provision at issue in this case was sandwiched at enact-

ment between other CSPA provisions that use "converted" to describe recategorization of an existing petition based on changed circumstances, not the filing of a new petition or the replacement of the original petitioner with a different one.

Second, no other aspect of the text of Section 1153(h)(3) supports the Ninth Circuit's ruling. While the first half of that provision refers to Section 1153(h)(1), that reference does not indicate that all petitions covered by Section 1153(h)(1) are necessarily subject to automatic conversion under Section 1153(h)(3). Indeed, it is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous, and the Ninth Circuit erred by focusing on the first half and effectively ignoring the succeeding text. In addition, Section 1153(h)(3) cannot reasonably be read to make automatic conversion and priority-date retention separate and independent benefits. The provision applies only if automatic conversion is available, while also clarifying that a converted petition should be given its original priority date rather than a new priority date corresponding to the date of the conversion.

Third, the broad interpretation of Section 1153(h)(3) adopted by the Ninth Circuit is inconsistent with the overall statutory scheme because it would substantially disrupt the immigrant-visa system. That interpretation would "not permit more aliens to enter the country or keep more families together," Pet. App. 35a (dissenting opinion), but would negatively affect many aliens who have been waiting for a visa for a long time by pushing aliens such as respondents' sons and daughters—likely tens of thousands of people—to the front of the line. Because changing priority dates is a "zero-sum game,"

ibid., such reshuffling would substantially increase the wait times of others currently in line, with many resulting unfairnesses. The Board's narrower interpretation of Section 1153(h)(3), in contrast, does not create such difficulties. If Congress had intended the kind of far-reaching change that the Ninth Circuit's reading dictates, it would undoubtedly have said so far more clearly.

Finally, the legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case. The legislative history is of limited usefulness here; Congress did not specifically discuss Section 1153(h)(3), and the relevant history primarily consists of floor debate, which is weak evidence of congressional intent. Nevertheless, nothing in that debate suggests that Congress intended to create the striking disruption that the Ninth Circuit's reading of Section 1153(h)(3) would require. Rather, the debate suggests that Section 1153(h)(3), which was not directed at the administrative-delay problem on which Congress was focused, was intended to work only a limited change—one that modestly expanded the scope of an existing regulatory provision.

For all of these reasons, the Board's narrower interpretation of Section 1153(h)(3) is a reasonable one. And while the Ninth Circuit did not reach the question of whether the Board's interpretation of Section 1153(h)(3) is entitled to *Chevron* deference, such deference is appropriate. The Board applied its expertise to the whole statutory and regulatory scheme at issue, and chose a reading of Section 1153(h)(3) that works seamlessly with related provisions while also giving full force to the automatic-conversion language that Congress enacted. In addition, the Board made a sensible policy choice not

to interpret Section 1153(h)(3) to grant special priority status to independent adults at the expense of the aliens already patiently waiting in the visa line that those adults would join.

ARGUMENT

This Court has held that "principles of *Chevron* deference are applicable to [the] statutory scheme" of the INA. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2017 (2012); see also 8 U.S.C. 1103(a)(1) and (g); 8 C.F.R. 1003.1(d)(1). Indeed, the Court has emphasized that "[j]udicial deference to the Executive Branch is especially appropriate in the immigration context," *Aguirre-Aguirre*, 526 U.S. at 425, where "executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations,'" *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009) (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988))—including decisions about whether to afford aliens the ability to immigrate to this country, see *Fiallo* v. *Bell*, 430 U.S. 787, 788, 791-793 (1977) (addressing definition of "child" and "parent" in provisions governing "special preference immigration status").

Under that framework, the Ninth Circuit erred in refusing to defer to the BIA's interpretation of Section 1153(h)(3). The provision cannot be read as an "unambiguously expressed" directive to grant special priority status to aliens who were once eligible for derivative-beneficiary status only because they were children but have since become independent adults with no qualifying relationship to the person who filed the visa petition. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Rather, Section 1153(h)(3) is sensibly read to grant a special priority to a more limited group of al-

iens—those who do have such a qualifying relationship and whose petitions therefore can "automatically be converted" from one "appropriate" family-preference "category" to a different one without the need for a new petitioner and a new petition. 8 U.S.C. 1153(h)(3). The provision's text, the larger statutory scheme governing immigrant visas, and the relevant legislative history all support reading Section 1153(h)(3) in this narrower manner. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Because the Board gave the provision that "reasonable construction," the agency's position must "prevail[]," regardless of whether "it is the only possible interpretation or even the one a court might think best." *Martinez Gutierrez*, 132 S. Ct. at 2017.[6]

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[6] The ambiguity inherent in Section 1153(h)(3) is highlighted by the extensive judicial disagreement over its scope. Five of the 11 circuit judges who considered this case en banc deemed the provision ambiguous, as did all three of the other circuit judges who sat on the original panel. See Pet. App. 24a-25a, 37a, 60a; see also *Robles-Tenorio* v. *Holder*, 444 Fed. Appx. 646, 649-650 (4th Cir. 2011) ("Section 1153(h) is far from a model of clarity. It is unclear whether the text and structure of (h)(1) and (h)(3) can be reconciled in any coherent or reasonable fashion.") (footnote omitted). And a three-judge panel in the Second Circuit ruled unanimously that the Board's interpretation is the only reasonable reading of Section 1153(h)(3)—so that the provision unambiguously *excludes* aliens like respondents' sons and daughters from the relief that it affords to certain aged-out former derivative beneficiaries. See *Li* v. *Renaud*, 654 F.3d 376, 383-385 (2011). But see *Khalid* v. *Holder*, 655 F.3d 363, 370-371 (5th Cir. 2011) (finding provision unambiguous but reaching opposite conclusion from *Li*). Under these circumstances, it should not be difficult to conclude that reasonable people can "differ as to the[] construction" of Section 1153(h)(3). *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam); see also, *e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996).

A. Section 1153(h)(3) Does Not Unambiguously Foreclose the Board's Interpretation

1. The Ninth Circuit's conclusion that Section 1153(h)(3) unambiguously forecloses the Board's interpretation cannot be reconciled with the provision's statement that "the alien's petition shall automatically be converted to the appropriate category"

a. "As in all statutory construction cases, we begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1153(h)(3) provides that "[i]f the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3).

That statutory language is not an unambiguous command to grant a priority to all aliens who have aged out of derivative-beneficiary status. Reading the provision as such a command is difficult to square with the part of the provision specifying that "the alien's petition shall automatically be converted to the appropriate category." That specification contains a number of discrete requirements, all of which support the Board's reading.

First, the petition that is relevant to the analysis is "the alien's petition"—that is, the petition as to which the alien was at one point a principal or derivative beneficiary with the status of a "child" under the age of 21. See 8 U.S.C. 1153(h)(1) and (3) (discussing the calculation of the age of "an alien"); see also 8 U.S.C. 1153(a)(2)(A) (creating family-preference category F2A, which includes "children" of lawful permanent residents); 8 U.S.C. 1153(d) (permitting a "child" to "accom-

pany[]" or "follow[] to join" a principal-beneficiary parent); 8 U.S.C. 1101(b) (defining "child" as a person under age 21). The statutory text does not make a different or subsequent petition eligible for conversion.

Second, the "alien's petition" is to be "converted to the appropriate category." The word "converted" signifies that the petition is to be transformed in some way, to "change from one form or function to another." *Merriam-Webster's Collegiate Dictionary* 273 (11th ed. 2005) (defining "convert"). It does not, however, suggest an alteration in the essential character of the petition—water may be "converted" to ice, and ice to water, see *ibid.*, but neither one can be "converted" into stone or wood. Moreover, Section 1153(h)(3) provides for only one kind of conversion: from one category to another one that is "appropriate." 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(a). Each family-preference category is defined by reference to the identity of the U.S. citizen or lawful permanent resident petitioner, who must signify his or her desire to affirmatively aid a family member by filling out a Form I-130, supplying evidence of a bona fide relationship with the principal beneficiary or beneficiaries, and meeting a number of other substantial requirements. See, *e.g.*, 8 U.S.C. 1153(a), 1154. An "appropriate category" to which the alien's petition may be "converted" is best understood as a category in which the petitioner remains the same and therefore retains the same basic relationship to the now former "child"—not a category of a fundamentally different character.

Third, the statute provides that the conversion "shall" take place "automatically" if the age of the alien "is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). As relevant here, "[a]utomatically" means "largely or wholly involuntary"

or "done spontaneously or unconsciously." *Merriam-Webster's Collegiate Dictionary* 84 (11th ed. 2005) (defining "automatic"); see *The American Heritage Dictionary* 143 (2d ed. 1982) (defining "automatic" as "[a]cting or operating in a manner essentially independent of external influence or control"); Pet. App. 30a. Accordingly, the automatic conversion that Section 1153(h)(3) envisions cannot involve the identification of a new petitioner or the filing of a new petition, both of which would require significant outside input and introduce new contingencies. It must, rather, consist of a smooth movement from one valid category to another without any intervening gap or steps and without the need for any change in the substance of the petition itself—as if, for example, the label "F2A" (signifying a petition by a lawful permanent resident for her child under age 21) were simply replaced with the label "F2B" (signifying a petition by a lawful permanent resident for her adult son or daughter).

b. With respect to certain aliens covered by the statutory subsections to which Section 1153(h)(3) refers—"subsections (a)(2)(A) and (d)," 8 U.S.C. 1153(h)(3)—all of the requirements of the automatic conversion language are readily met. But with respect to the kind of petitions at issue in this case—F3 and F4 petitions as to which the sons and daughters of respondents (and others like them) were formerly entitled to derivative status as children—those explicit statutory requirements simply cannot be satisfied. Accordingly, Section 1153(h)(3) does not unambiguously apply to all derivative beneficiaries. See *Negusie*, 555 U.S. at 524; see also Pet. App. 27a-33a; *Matter of Wang*, 25 I. & N. Dec. 28, 35-36, 38-39 (B.I.A. 2009).

There are two groups of aged-out persons whose petitions can be converted automatically from one valid category to another: those who qualified as a principal beneficiary of an F2A petition filed by a lawful permanent resident on behalf of a child, and those who qualified as a derivative beneficiary of an F2A petition filed by a lawful permanent resident on behalf of a spouse. See 8 U.S.C. 1153(a)(2)(A) and (h)(3); *Matter of Wang*, No. A 088 484 947, 2010 WL 9536039, at *4 n.3 (B.I.A. May 21, 2010). As to the first group, when a child who is the principal beneficiary of a petition filed under "subsection[] (a)(2)(A)" turns 21 and ages out of F2A eligibility, the petition can "automatically be converted" to an F2B petition for the petitioner's now-adult son or daughter. 8 U.S.C. 1153(h)(3). With respect to both the F2A and the F2B categories, the proper petitioner is the beneficiary's parent, so no new petition need be filed. In addition, no gap arises in the beneficiary's eligibility for a family-preference category: at the moment the F2A category is no longer an "appropriate" one, the F2B category becomes fully "appropriate." *Ibid.*; see Pet. App. 52a.

The second group includes some aliens covered by "subsection[] * * * (d)," which allows for derivative beneficiaries to "accompany[] or follow[] to join" a "parent." 8 U.S.C. 1153(d). A lawful permanent resident filing an F2A petition for her spouse may choose to name the spouse's child as a derivative beneficiary, rather than filing a separate F2A petition (with associated filing fees) naming the child as a principal beneficiary in his or her own right. See Pet. App. 57a n.6; see also 8 C.F.R. 204.2(a)(4). In that circumstance, when the child turns 21 and ages out of derivative status, the petition can likewise "automatically be converted" to an

F2B petition for an unmarried adult son or daughter. See Pet. App. 57a, 59a-60a. Again, the identity of the petitioner does not change, and the conversion can take place seamlessly, without any period of time during which the aged-out former "child" is ineligible for inclusion in any "appropriate category" at all. 8 U.S.C. 1153(h)(3).

There are serious problems, however, with any attempt to extend eligibility to an F3 or F4 petition as to which an alien was a derivative child beneficiary prior to aging out. 8 U.S.C. 1153(h)(3). There simply is no "appropriate category" to which "the alien's petition" can "automatically be converted." In the case of an F3 petition (for married sons and daughters of U.S. citizens), the petitioner is the U.S. citizen grandparent of the aged-out former derivative beneficiary, and Congress has not provided for a citizen to file a petition to obtain an immigrant visa on behalf of a grandson or granddaughter. See 8 U.S.C. 1153(a). In the case of an F4 petition (for a U.S. citizen's brother or sister), the petitioner is the U.S. citizen aunt or uncle of the aged-out former derivative beneficiary, and there likewise is no statutory category that allows a citizen to petition for a visa on behalf of a niece or nephew. See *ibid.*; see, *e.g.*, Pet. App. 29a; *Li*, 654 F.3d at 385.

The en banc majority suggested that an "appropriate category" here could be F2B, which covers the adult sons and daughters of lawful permanent residents (although the majority was uncertain as to how exactly such a conversion would work). Pet. App. 18a, 20a & n.3. But that is putting a square peg in a round hole. As the en banc dissent explained (*id.* at 29a-31a), the F2B category could come into play in this context only if the parent of an aged-out derivative beneficiary of an F3 or F4

petition received a visa as the principal beneficiary of a petition whose priority date became current, thereafter applied for and was granted lawful permanent resident status, and then chose at some still later point to file a new F2B petition naming the now-adult son or daughter as a principal beneficiary. See 8 U.S.C. 1153(a). Such a new petition, filed by a new petitioner, cannot be filed immediately when the derivative beneficiary ages out, see 8 U.S.C. 1153(h)(1); Pet. App. 21a n.4, because some time must necessarily elapse between the date when the visa becomes available to the parent and the date when he or she establishes eligibility (if the parent can meet all applicable requirements) and actually is granted lawful permanent resident status. See, *e.g.*, 8 U.S.C. 1153(g) (allowing up to one year for an alien to apply for a visa after notification that one is available); 8 U.S.C. 1201(a), 1255 (governing processes by which an alien who qualifies for a visa can attain the right to reside in the United States as a lawful permanent resident). Indeed, a new petition might never be filed at all; the aged-out person's parent might not submit an F2B petition even when capable of doing so. It is difficult to see how a shift from an F3 or F4 petition filed by one person to a new F2B petition that might or might not be filed later by a different person can reasonably be characterized as an "automatic[] * * * conver[sion]" of "the alien's petition." 8 U.S.C. 1153(h)(3); see Pet. App. 30a.[7]

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[7] The en banc majority stated that the reference in Section 1153(h)(3) to an "original petition" could be read to "suggest[] the possibility of a new petition," indicating that "automatic conversion could require more than just a change in visa category." Pet. App. 20a. But the phrase "original petition" is most naturally read as a way of referring to a single petition *prior to* its conversion. 8 U.S.C. 1153(h)(3). Section 1153(h)(3) thus provides that when "the alien's

Respondents have attempted to overcome that difficulty by arguing that an F3 or F4 petition could "automatically be converted" to the F2B category if the former derivative beneficiary's parent becomes a lawful permanent resident, regardless of whether that parent—who is the only rightful petitioner in that category—actually then files a petition of his or her own. See Br. in Opp. 28. But such a change in the fundamental character of the petition is hardly an "automatic[] * * * conver[sion]" to an "appropriate category." It would not account for the gap in the aged-out alien's eligibility prior to when the parent was granted lawful permanent resident status, and would entail at a minimum "editing the original petition" to eliminate the original petitioner's name and identifying information and substitute in the name and information of a brand-new petitioner. Pet. App. 20a.

That kind of "editing" would be at odds with a basic premise of the immigrant-visa system. Filing a petition manifests an affirmative intent to bring a family member to this country; the petitioner must provide a great deal of personal data, make various representations, and meet a number of different requirements. See, *e.g.*, 8 U.S.C. 1153(e) ("Immigrant visas * * * shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the [Secretary]"); 8 U.S.C. 1154(a)(1)(A)(i) (providing that a person who wants to seek classification of a family member "may file a petition with the [Secretary]"); 8 U.S.C. 1154(a)(1)(A)(viii) (restricting the filing of an F2A or F2B petition by a lawful permanent resident who has

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petition" is transformed through conversion, it nevertheless "retain[s]" the priority date that was "issued upon receipt" of the petition in its "original" state. *Ibid.*

committed certain kinds of offenses); 8 C.F.R. 204.2(d)(2) (requiring evidence of relationship between visa petitioner and principal beneficiary, including blood tests in certain circumstances); see also Richard D. Steel, *Steel on Immigration Law* § 5:30, at 5-55 (2d ed. 2010) (*Steel*). While many parents who become lawful permanent residents may be willing to sponsor their adult sons and daughters for immigrant visas of their own, not all parents will choose to take the necessary steps for all of their offspring. Cf. 8 C.F.R. 103.2(b)(6) (granting a petitioner the unilateral right to withdraw a petition).[8] There is simply no way to know for certain whether an F2B petition is proper unless the aged-out derivative beneficiary's parent actually applies for and is granted lawful permanent resident status and decides to file such a petition. See *Costello* v. *INS*, 376 U.S. 120, 127-128 (1964) ("We would hesitate long before adopting a construction * * * which would * * * completely nullify a procedure so intrinsic a part of the legislative scheme.").

c. For these reasons, Section 1153(h)(3) cannot be read to apply unambiguously to the now-adult sons and daughters of respondents. That conclusion is bolstered by the limited way in which Congress used the term "converted" (or its variants) elsewhere in the CSPA itself, as well as by the way that the term "conversion" is used in relevant regulations that were in place at the

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[8] A person claiming derivative-beneficiary status as a "child" need not have actually been named in the petition as to which his or her parent was a principal beneficiary, cf. 2 Shane Dizon and Nadine K. Wettstein, *Immigration Law Service* § 7:100, at 7-106 to 7-107 (2d ed. 2013)—and any decision to name the person would have been made (in the case of an F3 or F4 petition) by a grandparent, aunt, or uncle, and not by a parent.

time the CSPA was enacted. See *Li*, 654 F.3d at 384; *Wang*, 25 I. & N. Dec. at 34-35.

In the CSPA, Congress referred to conversion not only in Section 3, at issue in this case, but also in two other sections: Section 2, now codified at 8 U.S.C. 1151(f), and Section 6, now codified at 8 U.S.C. 1154(k). Section 2 contemplates that a petition "initially filed" by a lawful permanent resident to classify his or her child in the F2A category may be "converted" to an immediate-relative petition if the petitioner becomes a naturalized citizen. 8 U.S.C. 1151(f)(2) (providing that determination whether the alien qualifies as an immediate-relative "child" is "made using the age of the alien on the date of the parent's naturalization"); see 8 C.F.R. 204.2(i)(3). It also contemplates that a petition "initially filed" by a U.S. citizen to classify an alien as a married son or daughter in the F3 category may be "converted" to an appropriate U.S.-citizen-petitioner category when the alien's marriage terminates (that is, to an F1 petition, for the citizen's unmarried son or daughter, or to an immediate relative petition, for the citizen's unmarried child). 8 U.S.C. 1151(f)(3) (providing that determination whether the alien qualifies as an immediate-relative "child" is "made using the age of the alien on the date of the termination of the marriage"); see 8 C.F.R. 204.2(i)(1)(iii). Section 6 states that a petition filed by a lawful permanent resident to classify an alien as an unmarried son or daughter in the F2B category "shall be converted" to an F1 petition (for the unmarried son or daughter of a U.S. citizen) if the petitioner becomes a naturalized citizen. 8 U.S.C. 1154(k)(1); see 8 U.S.C. 1154(k)(2) (providing that alien may elect otherwise).

Each of the conversions addressed in Section 2 and Section 6 involves a single petitioner and the recategorization of an existing petition due to a change in the circumstances of the petitioner or the beneficiary. None of those conversions involves a new petition, a new petitioner, or a gap in the beneficiary's eligibility for a family-related visa category. Given that the language codified in Section 1153(h)(3) was "sandwiched between" these two provisions when Congress enacted the CSPA, it is reasonable to assume that Congress meant to use the term "converted" in the same way in all three provisions. *Kucana* v. *Holder*, 558 U.S. 233, 246 (2010); see, *e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972).[9]

The regulatory backdrop against which Congress enacted the CSPA embodies the same understanding of what conversion means. At that time, as today, the

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[9] Congress has enacted one other provision that refers to the conversion of an immigrant visa petition. In the National Defense Authorization Act for Fiscal Year 2008 (NDAA of 2008), Pub. L. No. 110-181, 122 Stat. 3, later amended by the Act of June 3, 2008, Pub. L. No. 110-242, 122 Stat. 1567, which post-dated the CSPA by several years, Congress provided that the "Secretary of Homeland Security or the Secretary of State may convert an approved petition for special immigrant status" under the NDAA for Fiscal Year 2006 "with respect to which a visa * * * is not immediately available to an approved petition for special immigrant status" under the NDAA of 2008. § 2, 122 Stat. 1567 (8 U.S.C. 1101 note). That conversion provision permitted certain Iraqi and Afghan translators and interpreters working for the U.S. military who were entitled to special immigrant status under the NDAA of 2006 to obtain such status under the very similar NDAA of 2008, which allowed for a greater number of visas to be issued each year; the provision did not entail a change in the petitioner or the alien's loss of visa eligibility at any point along the way. See NDAA for Fiscal Year 2006, Pub. L. No. 109-163, § 1059, 119 Stat. 3443; § 1244, 122 Stat. 396.

relevant regulation provided for "[a]utomatic conversion of preference classification" to move petitions from one appropriate category to another under limited circumstances (for example, a change in the beneficiary's marital status or the naturalization of the petitioner) that do not require a new petitioner or a new petition. See 8 C.F.R. 204.2(i); 52 Fed. Reg. 33,797 (Sept. 8, 1987).[10] Congress plainly had that regulatory backdrop in mind when it enacted the CSPA, since the kinds of conversion contemplated by Section 2 and Section 6 of that Act are specifically authorized by 8 C.F.R. 204.2. See 8 U.S.C. 1151(f)(2) and (3); 8 U.S.C. 1154(k)(1); 8 C.F.R. 204.2(i)(1)(iii) and (3). Thus, while Congress is in any event presumed to be aware of pertinent regulations, see, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), in this case no such presumption is necessary. By effectively incorporating the existing regulatory meaning of conversion into the CSPA, Congress surely intended to use the term "convert" as the regulation does. See *Foti* v. *INS*, 375 U.S. 217, 223 (1963) ("It must be concluded that Congress knew of this familiar administrative practice and had it in mind * * * . These usages and procedures, which were actually followed when the provision was enacted, must reasonably be regarded as composing the context of the legislation."); see also *Agosto* v. *INS*, 436 U.S. 748, 754 (1978).

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[10] That regulatory understanding of conversion has been in place for decades. See, *e.g.*, 8 C.F.R. 205.8 (1965) ("Conversion of classification of third preference beneficiaries upon naturalization of petitioner"); 8 C.F.R. 204.5 (1976) ("Automatic conversion of classification of beneficiary," covering changes in beneficiary's marital status).

2. *No other portion of Section 1153(h)(3)'s text supports the Ninth Circuit's conclusion that the provision unambiguously forecloses the Board's interpretation*

Respondents have pointed to two other features of the text of Section 1153(h)(3) in support of their argument that the provision must be read to grant special priority status to their aged-out sons and daughters. Neither one establishes that Section 1153(h)(3) is unambiguous.

a. First, respondents have pointed (Br. in Opp. 15-16) to the conditional phrase with which Section 1153(h)(3) opens: "If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section." 8 U.S.C. 1153(h)(3). The en banc majority's decision rested entirely on that phrase. It reasoned that because paragraph (h)(3) cross-references paragraph (h)(1), which itself identifies the "applicable petition" as described in paragraph (h)(2), then paragraph (h)(3) must command special priority status with respect to all of the petitions described in paragraph (h)(2)—that is, all F2A petitions and all family-preference petitions as to which "an alien child * * * is a derivative beneficiary." 8 U.S.C. 1153(h)(1)-(3); see Pet. App. 15a-16a.

That trail of cross-references would be an exceedingly round-about way of defining the scope of Section 1153(h)(3). It would have been far more direct had Congress simply made Section 1153(h)(3) "applicable" to any "petition described in paragraph [(h)](2)," or if Congress had stated that paragraph (h)(2) described petitions for purposes of "this subsection" rather than simply for purposes of "this paragraph." 8 U.S.C. 1153(h)(1)-(3).

In any event, the mere fact that Section 1153(h)(3) cross-references Section 1153(h)(2)—at one remove—

does not dispel the ambiguity that exists as a result of the provision's automatic conversion language. It is clear that an aged-out former derivative beneficiary cannot qualify for special priority status under paragraph (h)(3) unless he or she has been subjected to the formula set out in paragraph (h)(1) and had his or her age computed as 21 or older. But it does not follow that *every* person whose age is computed under paragraph (1)—that is, every beneficiary of a petition identified in paragraph (2)—must also receive the distinct form of relief described in paragraph (3). By its own terms, paragraph (3) cannot aid aged-out persons whose petitions cannot automatically be converted to an appropriate category. Thus, Section 1153(h)(3) can reasonably be read to encompass only the qualifying subset of beneficiaries of the petitions described in paragraph (2), rather than the entire group.

In short, the tension between the first half of Section 1153(h)(3) and the automatic-conversion language is exactly what makes Section 1153(h)(3) ambiguous and deference to the Board's resolution of that tension appropriate. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664-666 (2007). By treating the cross-references as dispositive, the en banc majority simply closed its eyes to the succeeding text that expressly points in the opposite direction. The majority was forced to acknowledge that "conversion" with respect to aged-out former derivative beneficiaries of F3 and F4 petitions would create "administrative complexities" and "unresolved procedural questions" in light of the uncertainty and "lag time" associated with the prospect of a new petitioner. Pet. App. 20a-22a. Indeed, the majority could not explain exactly how "conver[sion]" would work under those circumstances—

and, in particular, whether it envisioned a procedure that would require the filing of a new F2B petition. *Ibid.* But it nonetheless shunted any consideration of the statutory language requiring automatic conversion of an existing petition into a separate analysis of whether its broad interpretation of Section 1153(h)(3) was so unworkable or "so bizarre that Congress 'could not have intended' it." *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991) (citation omitted); see Pet. App. 19a-23a. That was error.

In order to determine whether a statute is unambiguous to begin with, a court must employ the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including examination of *all* of a provision's language, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Because Congress included the automatic conversion language in the text of Section 1153(h)(3) itself, that language must be considered in determining whether the Board's interpretation is unambiguously foreclosed. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (stating that a statute should be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant") (citation omitted). That language is not, as the en banc majority believed, simply a description of a difficulty that the agency might encounter in administering the statute as interpreted by the court and that the agency should be expected to cope with as best it may. Pet. App. 22a ("It is the agency's task to resolve these complications, not the court's."); see *id.* at 31a-32a.

b. Second, taking a position that the en banc majority did not espouse, respondents have argued (Br. in Opp. 21) that Section 1153(h)(3) provides that conversion of a petition and retention of a priority date are separate

statutory benefits, so that an alien may be entitled to "retain the original priority date" with respect to a new petition even if automatic conversion of an existing petition is not possible. But that is not the most natural reading of the provision. See *Crooks* v. *Harrelson*, 282 U.S. 55, 58 (1930) (explaining that the word "and" is ordinarily used in a conjunctive sense). Indeed, the Second Circuit concluded that respondents' proposed reading of Section 1153(h)(3) is unambiguously wrong. See *Li*, 654 F.3d at 383-384; see also Pet. App. 32a-33a (dissenting opinion). If the statute simply provided that "the alien's petition shall automatically be converted to the appropriate category," it would be unclear whether the converted petition should retain the original priority date or should be given a new priority date corresponding to the date of the conversion.[11] The last clause of Section 1153(h)(3) provides the needed clarification, rather than conferring an independent benefit—and Section 1153(h)(3) therefore is most naturally read to say that the priority date of the "original petition" shall be "retain[ed]" *when* the conversion takes place, assuming that an "appropriate category" exists and conversion is possible. 8 U.S.C. 1153(h)(3); see *Li*, 654 F.3d at 383 ("Congress could have, but did not, provide beneficiaries the option to select *either* conversion *or* retention *or* both. Instead, Congress specified both an automatic conversion to a different category and a retention of the original priority date."); see also Pet. App. 32a-33a, 54a-55a.

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[11] For this reason, provisions that contemplate conversion of a visa petition to a new family-related category specify whether the original priority date will continue to attach to the petition after the conversion is complete. See, *e.g.*, 8 U.S.C. 1154(k)(3) (codifying Section 6 of the CSPA); 8 C.F.R. 204.2(i).

Moreover, respondents' interpretation of Section 1153(h)(3) would give rise to odd results. A priority date is a feature of a petition. See 8 C.F.R. 204.1. If an alien could retain a priority date even if he or she were no longer the proper subject of any pending petition—simply holding onto it in the hope that a valid petition might someday be filed on his or her behalf—then the priority date could remain "live" for years or even decades after the original petition became defunct. And since derivative beneficiaries need not be named in any petition, see note 8, *supra*, even aliens whose names never appeared on any document submitted to the government could "retain" old priority dates in that open-ended manner. That would introduce considerable uncertainty into the workings of the immigrant-visa system, and Congress presumably would have provided for it much more directly had it been intended. See 8 U.S.C. 1153(g); *Wang*, 25 I. & N. Dec. at 38.[12]

Since conversion and retention are textually tied together, and the Board has reasonably construed Section 1153(h)(3)'s conversion language to exclude respondents' sons and daughters, there is no need to parse the mean-

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[12] Indeed, Congress has previously so provided with respect to a limited class of aliens, using clear language that it did not employ here. See Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2707 ("Any petition filed by, or in behalf of, * * * an alien [meeting certain requirements] to accord him a preference status * * * shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien."); cf. 8 U.S.C. 1154(k) (codifying Section 6 of the CSPA, which provides for conversion of a petition from the F2B category to the F1 category under certain circumstances, and states that "[r]egardless of whether a petition is converted under this subsection or not" the beneficiary "may maintain" the priority date assigned when the petition was filed); *Li*, 654 F.3d at 384.

ing of Section 1153(h)(3)'s statement that "the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3); see Pet. App. 32a-33a. But even if Section 1153(h)(3) somehow were read to unambiguously treat retention as a separate benefit, it still could not be read to unambiguously extend that benefit to the circumstances of this case. As the Board explained, even where a new petition was to be filed, "the concept of 'retention' of priority dates has always been limited" to a situation in which the successive family-preference petition was filed by the same petitioner. *Wang*, 25 I. & N. Dec. at 35. That understanding of retention is consistent with the use of the term in the regulations in effect when the CSPA was enacted. See 8 C.F.R. 204.2(a)(4). For example, an alien who is the principal beneficiary of an F4 petition filed by her U.S. citizen brother and who later becomes the principal beneficiary of an F1 petition filed by her naturalized U.S. citizen mother cannot "retain" the F4 priority date for use in connection with the F1 petition. See *ibid.*; see also generally *Board of Trs. of the Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2197 (2011). By choosing a term with an existing meaning and limitation as a matter of immigration law, Congress ensured that aged-out persons would not be treated differently from other aliens who become the subject of a new family-preference petition filed by a new petitioner.

3. The Ninth Circuit's conclusion that Section 1153(h)(3) unambiguously covers aged-out former derivative beneficiaries of F3 and F4 petitions would disrupt the statutory scheme for immigrant visas

In determining whether Section 1153(h)(3) "specifically addresse[s] the question at issue" in this case, it is

also important to consider how the language of that provision fits into "the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 132-133 (citation omitted); see *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991). Here, the broad interpretation adopted by the en banc majority would substantially disrupt the immigrant-visa system, which is defined by various statutory rules and numerical limits. It also would undermine the goal of family unity—a result that Congress surely would have provided for far more clearly if it had been intended. In contrast, the Board's narrower interpretation works smoothly with other relevant provisions and draws a reasonable line that essentially codifies an existing regulation and is consistent with the CSPA's purpose. For this reason, too, Section 1153(h)(3) cannot be read to unambiguously grant special priority status to aged-out former derivative beneficiaries of F3 and F4 petitions.

a. Implementation of the en banc majority's interpretation of Section 1153(h)(3) would destabilize the immigrant-visa system. See *Wang*, 25 I. & N. Dec. at 38-39. The number of aliens able to advance their priority dates under the Ninth Circuit's interpretation of Section 1153(h)(3) could be in the tens of thousands, or even higher. See generally U.S. Dep't of State, *Annual Report of Immigrant Visa Applications in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of Nov. 1, 2012*, at 6-7, http://www.travel.state.gov/pdf/WaitingListItem.pdf (*Immigrant Waiting List*) (stating that approximately 90,000 aliens may immigrate in the F3 and F4 categories every year). No mechanism exists to track which pending petitions include derivative-beneficiary children who have since aged out, and there is no way of

knowing how many new visa petitions or applications naming them would be filed in the future. Indeed, one consequence of the Ninth Circuit's interpretation of Section 1153(h)(3) might be that there is no time limit on an aged-out former beneficiary's ability to claim an "original" priority date; in that event, years or even decades could pass between the time that the beneficiary aged out and the time that the claim is asserted. See Pet. App. 74a.

Almost all of the aged-out F3 and F4 derivative beneficiaries who would directly benefit from the Ninth Circuit's interpretation by obtaining an earlier priority date would undoubtedly do so via the F2B line, which covers petitions filed by lawful permanent residents on behalf of their unmarried adult sons and daughters. See 8 U.S.C. 1153(a)(2)(B). Some of those beneficiaries are already waiting in that line as a result of new F2B petitions filed on their behalf, but would now claim earlier priority dates than the ones they are currently accorded. Others would join the line for the first time and claim the old priority dates under which their parents obtained visas in the past, because some number of those new lawful permanent residents never filed at all for an F2B visa for their now-adult sons and daughters due to the length of the wait time. See generally *Immigrant Waiting List*.[13]

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[13] Other aged-out former derivative beneficiaries who would claim their parents' old priority dates are waiting in or would newly join the F1 line (for unmarried adult sons and daughters of U.S. citizens) or the F3 line (for married sons and daughters of U.S. citizens), see 8 U.S.C. 1153(a)(1) and (3), because their parents originally qualified as lawful permanent residents but subsequently became naturalized citizens, see 8 U.S.C. 1154(k), 1427; Pet. App. 82a n.1.

If a former derivative beneficiary of an F3 or F4 petition was 21 or older when "an immigrant visa number became available for the alien's parent," 8 U.S.C. 1153(h)(1)(A), and if such a person were then entitled under Section 1153(h)(3) to retain the priority date of the old F3 or F4 petition and use it in the F2B category, he or she would almost always vault ahead of other aliens already waiting in the F2B line. Pet. App. 8a ("The effect of this older priority date is that the beneficiary is placed at or near the front of the visa line, and a visa would likely be available immediately or soon."). That is because, for aliens chargeable to every country in the world except for Mexico, the F3 and F4 visa lines involve a longer wait for a visa number than the F2B line. See *Visa Bulletin for Aug. 2013*. If a visa number is available for a beneficiary in the F3 or F4 line using a particular priority date, an alien holding that priority date will necessarily have an earlier date than those aliens currently waiting in a shorter F2B line. See *ibid.*

The result would be that many aliens already in line would have their places pushed back. Changing priority dates is a "zero-sum game," Pet. App. 35a; for every person who would be inserted toward the front of the line as a result of the Ninth Circuit's decision, another person would be moved closer to the end. As of November 1, 2012, there were 486,597 F2B petitions designated for consular processing overseas for which beneficiaries are awaiting visa numbers—many of which would likely be subject to reordering. See *Immigrant Waiting List* 2; *ibid.* (noting that 288,705 F1 petitions and 830,906 F3 petitions designated for consular processing were likewise awaiting visa numbers). Additional petitions designated for processing in the United States (because

their beneficiaries are already present in this country) would be subject to the same treatment.

Aliens pushed back in the line might see their waiting times increase substantially. Congress has made a minimum of 226,000 family-sponsored visas available each year, of which only approximately 26,000 are F2B visas, and has imposed additional per-country limits for each category. See 8 U.S.C. 1151-1153; *Immigrant Waiting List* 6; see also 8 U.S.C. 1151(c) (explaining calculation governing available number of family-sponsored visas). As of August 2013, for instance, visas are not available to Filipino nationals in the F2B category unless they have a priority date of December 22, 2002, or earlier. See *Visa Bulletin for Aug. 2013*, at 2. If a large number of Filipino nationals who now have priority dates after December 2002 were suddenly entitled to earlier priority dates under the Ninth Circuit's reading of Section 1153(h)(3) because they aged out under some earlier petition, then the cut-off date would retrogress in order to allow those persons to be processed without exceeding the yearly limit on F2B visas. That means that an alien outside the scope of Section 1153(h)(3) with a priority date of January 2003, whose priority date was about to become "current" and who has already been waiting for more than a decade, would have to wait an additional (and likely significant) amount of time. And such an alien would have no way of knowing how many former derivative beneficiaries might continue to surface, and how many newly immigrating F3 and F4 beneficiaries might pass on older priority dates to their aged-out sons and daughters, thus continuing to block her path to the front of the line.

Such a reordering of the waiting lines would create significant unfairness. The displaced aliens would al-

most certainly have been separated from their parents for longer than the aliens moving ahead of them in line. See, *e.g.*, Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233-2236 (2012) (setting out example in which application of the en banc majority's interpretation would mean that A's son gets a visa number before B's son, even though B became a lawful permanent resident years earlier than A and filed a petition naming her son earlier than A did, and even though B and her son have been separated longer than A and her son have). And the line-jumpers—who only obtained a relationship "that would independently qualify them for a visa" when their parent became a lawful permanent resident—would "bump aliens" who had such a "qualifying relationship" for a much greater period of time. Pet. App. 35a; see *id.* at 59a-60a (panel opinion) (refusing to "effectively treat an aged-out derivative beneficiary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen").

Respondents have urged (Br. in Opp. 33) that an aged-out former derivative beneficiary has already waited in line for a visa number along with the principal beneficiary, and should be given some sort of "credit" for that time. But that argument misconceives the role that the derivative beneficiary plays in the immigrant-visa scheme. Section 1153(d) permits the "child" of a principal beneficiary to accompany or follow to join the parent when the parent immigrates. It does so in order to ensure that at the moment the parent comes to this country he or she need not leave behind a child under

the age of 21, who cannot be expected to live independently. See 8 U.S.C. 1153(d), 1154(e); *Fiallo*, 430 U.S. at 796-798; *Santiago* v. *INS*, 526 F.2d 488, 490-491 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976). But a derivative beneficiary has no separate statutory rights. If the principal beneficiary dies abroad while waiting for a visa number, or decides not to immigrate after all, then the derivative beneficiary has no entitlement of any kind. See *Steel* § 5:44, at 5-73; 3 Charles Gordon et al., *Immigration Law and Procedure* § 37.05[2][a], at 37-16 (rev. ed. 2013). And a derivative beneficiary need not even have been in existence when the petition naming the principal beneficiary was filed; the derivative-beneficiary provision covers children born (or stepchildren acquired) during the period when the parent is waiting for a visa number to become available. See 8 U.S.C. 1101(b), 1153(d); see also note 8, *supra*. Accordingly, giving former derivative beneficiaries "credit for the years" in which they qualified as a "child" (Br. in Opp. 33)—a period during which they and their parents were not separated from each other—is not consistent with Section 1153(d). See Pet. App. 34a-35a, 59a-60a.[14]

In short, under the Ninth Circuit's interpretation, Section 1153(h)(3) would represent a significant altera-

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[14] The Ninth Circuit's contrary view of the statute would, for instance, permit an alien who became a principal beneficiary's stepchild at age 17, and then aged out of child status four years later, to get "credit" for all of the years the principal beneficiary waited in line prior to the marriage creating the stepchild relationship. It would also permit an alien who was 20 years old at the time a petition was filed naming her parent as principal beneficiary to retain the priority date associated with that petition, even if that date did not become current until she was 40 years old, but would deny the same special status to the alien's 41-year-old brother because he was 21 years old at the time of filing.

tion in the immigrant-visa system that would reshuffle the statutorily prescribed waiting lines, disrupt the settled expectations of a large number of intending immigrants and their families, introduce unwarranted tensions among the categories of aliens seeking to enter this country, and undermine the perception of fairness of the rules by which the United States welcomes new immigrants. Moreover, it would create these consequences solely to "solve" a "problem" caused by numerical limits that Congress itself set, and not by any administrative delay of the sort Section 1153(h) was primarily intended to address. Had Congress wanted to take such a step, surely it would "have said so clearly—not obliquely through an ambiguous" sentence in the CSPA "and an idiosyncratic use" of terms with a recognized meaning in the immigration context. *Stanford Univ.*, 131 S. Ct. at 2199; cf. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."). Indeed, to ensure that aged-out derivative beneficiaries of family-preference petitions were entitled to priority dates along with the principal beneficiaries, Congress would have had to look no farther than language contained elsewhere in the CSPA itself, which contains several provisions that freeze the age of a child as of the date the relevant petition was filed. See 8 U.S.C. 1151(f) (freezing age of child of U.S. citizen to date petition filed); 8 U.S.C. 1158(b)(3)(B) (freezing age of child to ensure continued derivative classification under asylum petitions); see also 8 U.S.C. 1255(i) (assessing "child" status of certain individuals at particular past date for adjustment-of-status purposes). Section 1153(h)(3) is

reasonably interpreted to provide a more confined form of relief.

b. The narrower interpretation of Section 1153(h)(3) adopted by the Board, which includes aged-out principal and derivative beneficiaries of F2A petitions but not aliens like respondents' sons and daughters, does not suffer from those same difficulties. Indeed, under the Board's interpretation, Section 1153(h)(3) largely serves to codify a regulation that existed prior to its enactment. See 8 C.F.R. 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner."); 57 Fed. Reg. 41,059 (Sept. 9, 1992); Pet. 22-23 & n.5 (discussing enforcement of regulation subsequent to CSPA's enactment); see also *Kucana*, 558 U.S. at 248-249; *Costello*, 376 U.S. at 129-130.

The Ninth Circuit thought that Congress could not have intended the narrower interpretation adopted by the Board because it does not make a significant change to the regulatory regime that existed when the provision was enacted. See Pet. App. 22a-23a. But there is no reason to believe that Congress wanted to make a major shift in policy, rather than to take the more modest step of giving statutory force to the agency's existing practices—including by use of terms with a recognized meaning in the immigration field. See pp. 47-49, *infra* (discussing legislative history). And the interpretation adopted by the Board in fact does modestly add to the benefits already expressly conferred by regulation. See 8 C.F.R. 204.2(a)(4). First, it makes conversion "automatic[]"—without requiring any additional petition (and

corresponding fee)—for aged-out derivative beneficiaries moving from the F2A category (which covers a lawful permanent resident's minor child (and spouse)) to the F2B category (which covers a lawful permanent resident's unmarried adult son or daughter). See 8 U.S.C. 1153(h)(3). Second, it covers aged-out principal beneficiaries of F2A petitions moving into the F2B category. See *ibid.*; Pet. App. 58a.[15]

It is perfectly rational for Congress to afford relief to only that limited group of aged-out persons. See *Fiallo*, 430 U.S. at 795 n.6 ("[L]imits and classifications as to who shall be admitted [as immigrants] are traditional and necessary elements of legislation in this area."); *id.* at 798 ("With respect to each of these legislative policy distinctions, it could be argued that the line should have been drawn at a different point and that the statutory definitions deny preferential status to parents and children who share strong family ties."); *INS* v. *Hector*, 479 U.S. 85, 89-91 (1986) (per curiam); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). Under the narrower reading of Section 1153(h)(3), conversion and priority-date

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[15] Moreover, contrary to the en banc majority's statement (Pet. App. 23a), a comparison between the language of the regulation and the language of the CSPA does not suggest that Congress meant Section 1153(h)(3) to cover new petitions filed by new petitioners. For the sake of clarity, the regulation specifies that "the original priority date will be retained *if the subsequent petition is filed by the same petitioner*," 8 C.F.R. 204.2(a)(4) (emphasis added), while Section 1153(h)(3) contains no similar language. But Section 1153(h)(3) provides relief only where automatic conversion of "the alien's petition" is possible—and with respect to a new petition filed by a new petitioner, the conversion requirement cannot be met. See pp. 25-28, *supra*. Having included the automatic-conversion language, Congress had no need to mirror the portion of the regulation to which the en banc majority pointed.

retention are available to aliens who were, or could have qualified as, principal beneficiaries in their own right all along—based on their own status—if they had been so designated by the citizen or lawful permanent resident who filed the original petition. In addition, under that reading, the aged-out derivative beneficiaries in the old categories would not leap to the front of a new (and typically longer) line in a new category and displace everyone else already patiently waiting a turn. See 8 U.S.C. 1153(a)(2) (providing that at least 77% of F2-category visas must be allocated to F2A); U.S. Dep't of State, *Visa Bulletin for July 2002* (June 7, 2002), http://www.travel.state.gov/visa/bulletin/bulletin_1353.html (showing F2A line as shorter than F2B line, with more recent priority dates, with respect to every country); U.S. Dep't of State, *Visa Bulletin for July 2013* (June 7, 2013), http://www.travel.state.gov/visa/bulletin/bulletin_5993.html (same); *Visa Bulletin for Aug. 2013*; see also § 6, 116 Stat. 929 (8 U.S.C. 1154(k) (demonstrating that Congress was aware of length of various visa-waiting lines).

4. The legislative history of the CSPA does not support the view that Section 1153(h)(3) unambiguously applies in this case

Nothing in the legislative history of the CSPA specifically discusses Section 1153(h)(3). But to the extent the relevant history—which primarily consists of floor debate, and is therefore weak evidence of congressional intent, see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 297 (2010)—sheds any light on the meaning of that provision, it undermines the broad interpretation adopted by the en banc majority.

The predominant focus of the CSPA's legislative history was on erasing delay caused by slow administrative processing. At the time the CSPA was enacted, processing of applications for adjustment of status took the Immigration and Naturalization Service several years, see H.R. Rep. No. 45, 107th Cong., 1st Sess. 1-3 (2001) (House Report); see also Pet. App. 59a; *Wang*, 25 I. & N. Dec. at 36-38, and an alien's age was calculated as of the date that such applications were adjudicated. Solving that problem was the stated reason for the introduction of the legislation, see House Report 3, as well as the main topic of congressional debate both before and after the language now codified as Section 1153(h)(3) was added by a Senate committee, see, *e.g.*, 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (statement of Rep. Jackson-Lee); 147 Cong. Rec. E1095-E1096 (daily ed. June 13, 2001) (statement of Rep. Mink); 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein). In fact, it was the only issue to which the sponsors of the bill in the House of Representatives referred when they discussed the changes made by the Senate and introduced the version of the bill that was ultimately enacted. See, *e.g.*, 148 Cong. Rec. at H4990 (statement of Rep. Sensenbrenner) (noting that the Senate's amendments addressed "situations where alien children lose immigration benefits by 'aging out' as a result of INS processing delays").

While a number of CSPA provisions, including Section 1153(h)(1), do address the administrative delay problem, Section 1153(h)(3) addresses a distinct form of "delay" that results from Congress's own yearly limits on admission in each of the various family-preference categories. Had Congress intended Section 1153(h)(3) to have the far-reaching effects the Ninth Circuit as-

cribed to it, the legislative history would not likely have been so silent on the subject. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991). At no point in Congress's consideration of the provision was there any indication that it considered the possibility, let alone intended, that Section 1153(h)(3) would create the striking change in the immigrant-visa system that the Ninth Circuit's reading of that provision would require—that is, reordering of visa waiting lines and retrogressions in the State Department's cut-off dates that would increase the wait times for thousands and thousands of intending immigrants. See House Report 13 (reprinting statement of Rep. Jackson-Lee) (noting that the committee intended to "solve the age-out problem without displacing others who have been waiting patiently in other visa categories, which was one of the issues that disturbed us"); 148 Cong. Rec. at H4992 (statement of Rep. Jackson-Lee) (same). That makes it far more probable that Section 1153(h)(3) was intended to work only a modest change—one that did not merit debate because it largely codified an existing regulatory provision.[16]

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[16] That conclusion is not undermined by the single arguable mention on the floor of the kind of wait times that Section 1153(h)(3) addresses. See 147 Cong. Rec. at S3275 (statement of Sen. Feinstein that one aspect of aging-out problem to be addressed is "growing immigration backlogs in the immigration visa category"). The language codified in Section 1153(h)(3) was not yet part of the bill at the time the statement was made. See S. 672, 107th Cong. (introduced Apr. 2, 2001). In addition, the context of the statement is a discussion of a principal beneficiary who is a "'child' of a United States citizen or lawful permanent resident"—that is, an F2A principal beneficiary, who would be covered under the Board's interpretation of Section 1153(h)(3). See 147 Cong. Rec. at S3275 (statement of Sen. Feinstein); see also Pet. App. 59a; p. 24, *supra*.

B. The Agency's Interpretation of Section 1153(h)(3) Is Reasonable And Merits Deference

Because the en banc majority resolved the appeal at *Chevron* step one, it did not address whether the Board's interpretation of Section 1153(h)(3) in *Wang* is a reasonable one that is entitled to deference. See *Chevron*, 467 U.S. at 843-844; see also *Negusie*, 555 U.S. at 516-517; *Aguirre-Aguirre*, 526 U.S. at 424-425. Under *Chevron*, courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted), such that it is "not one that Congress would have sanctioned," *Chevron*, 467 U.S. at 845 (citation omitted).

For the reasons set out in Point A above—and as the en banc dissent (and the original Ninth Circuit panel) explained—the Board's decision is indeed a reasonable one. Pet. App. 34a-35a, 57a-60a; see *Wang*, 25 I. & N. Dec. at 39 (explaining that Section 1153(h)(3) affords relief to principal and derivative beneficiaries of F2A petitions who become eligible for F2B classification when they age out of "child" status). The Board gave Section 1153(h)(3) a close and careful reading, and applied its unique expertise to consideration of the whole statutory and regulatory scheme relevant to the interpretation of that provision. See *id.* at 30-39; *Wang*, 2010 WL 9536039, at *1-*4. The Board's conclusion that Section 1153(h)(3) does not encompass aged-out former derivative beneficiaries of F3 and F4 petitions gives meaning to the statutory requirement of automatic conversion, see *Negusie*, 555 U.S. at 524, and does so in a manner consistent with past practice in immigration

statutes and regulations, see *Wang*, 25 I. & N. Dec. at 39; *Wang*, 2010 WL 9536039, at *1-*4.

The Board's reading also makes a "reasonable policy choice," *Chevron*, 467 U.S. at 845, not to depart from past practice and disrupt visa administration in order to grant special priority dates and reduce the wait times for former derivative-beneficiary children who have become independent adults. The en banc majority's contrary reading of the statute, after all, would "not permit more aliens to enter the country or keep more families together," but would negatively affect many aliens who have been waiting in visa lines for long periods of time. Pet. App. 35a (dissenting opinion). In light of the text and purpose of Section 1153(h)(3), as well as Congress's choice not to provide any preference for grandchildren, nieces, or nephews of U.S. citizens, the Board reasonably concluded that adult sons and daughters of lawful permanent residents like those involved in this case—capable of carrying on lives apart from their parents—should not be entitled to jump ahead of others who have been waiting in line. See *Wang*, 25 I. & N. Dec. at 38-39. Instead, the Board properly limited the special benefits of the provision to the subset of aliens who were always eligible to be principal beneficiaries if the person who filed the original petition had chosen to designate them as such. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (explaining that "[f]illing" a statutory "gap[] * * * involves difficult policy choices that agencies are better equipped to make than courts"); *Chevron*, 467 U.S. at 843 n.11, 844.

Accordingly, as the en banc dissent stated, the Board's decision should have been accorded *Chevron* deference and sustained. See Pet. 23-24; Pet. App. 33a-

35a. There is no basis for respondents' contention (Br. in Opp. 29-33) that the Board's decision is arbitrary and capricious—a demanding standard as to which respondents bear a heavy burden. See *National Ass'n of Home Builders*, 551 U.S. at 658; *City of Olmsted Falls, Ohio* v. *FAA*, 292 F.3d 261, 271-272 (D.C. Cir. 2002). The Board's "path" can readily "be discerned," *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); see *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 497 (2004), and the Board was not required to have "highlight[ed] the statute's gaps or ambiguity" or to have addressed every possible argument that respondents can now muster, *Martinez Gutierrez*, 132 S. Ct. at 2021; see *Aguirre-Aguirre*, 526 U.S. at 432. The Board's decision is, indeed, just as thorough and considered as "a multitude of agency interpretations" to which this Court "and other courts have routinely deferred." *Martinez Gutierrez*, 132 S. Ct. at 2021.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 1153 of Title 8 of the United States Code provides:

Allocation of immigrant visas

(a) Preference allocation for family-sponsored immigrants

Aliens subject to the worldwide level specified in section 1151(c) of this title for family-sponsored immigrants shall be allotted visas as follows:

(1) Unmarried sons and daughters of citizens

Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens

Qualified immigrants—

(A) who are the spouses or children of an alien lawfully admitted for permanent residence, or

(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence,

shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); ex-

cept that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

(3) Married sons and married daughters of citizens

Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

(4) Brothers and sisters of citizens

Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability

An alien is described in this subparagraph if—

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers

An alien is described in this subparagraph if—

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or

institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers

An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if—

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) Prohibition

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to

that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Statutory construction

Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 1154(a) of this title, or the filing of an application for adjustment of status under section 1255 of this title, by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

(IV) Effective date

The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) of this section before the enactment date of this subsection. In the case of a physician for whom an appli-

cation for a waiver was filed under subsection (b)(2)(B) of this section prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to subsection (b)(2)(B) of this section except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title.

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the

classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers

Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals

Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers

Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers

Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a)(5)(A) of this title.

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.

(5) Employment creation

(A) In general

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)—

(i) in which such alien has invested (after November 29, 1990) or, is actively in the

process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas

(i) In general

Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) "Targeted employment area" defined

In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) "Rural area" defined

In this paragraph, the term "rural area" means any area other than an area

within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required

(i) In general

Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas

The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas

In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment—

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate,

the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

(D) Full-time employment defined

In this paragraph, the term "full-time employment" means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

(6) Special rules for "K" special immigrants

(A) Not counted against numerical limitation in year involved

Subject to subparagraph (B), the number of immigrant visas made available to special immigrants under section 1101(a)(27)(K) of this title in a fiscal year shall not be subject to the numerical limitations of this subsection or of section 1152(a) of this title.

(B) Counted against numerical limitations in following year

(i) Reduction in employment-based immigrant classifications

The number of visas made available in any fiscal year under paragraphs (1), (2), and (3) shall each be reduced by 1/3 of the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title.

(ii) Reduction in per country level

The number of visas made available in each fiscal year to natives of a foreign state under section 1152(a) of this title shall be reduced by the number of visas made available in the previous fiscal year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(iii) Reduction in employment-based immigrant classifications within per country ceiling

In the case of a foreign state subject to section 1152(e) of this title in a fiscal year (and in the previous fiscal year), the number of visas made available and allocated to each of paragraphs (1) through (3) of this subsection in the fiscal year shall be reduced by 1/3 of the number of visas made available in the previous fiscal

year to special immigrants described in section 1101(a)(27)(K) of this title who are natives of the foreign state.

(c) Diversity immigrants

(1) In general

Except as provided in paragraph (2), aliens subject to the worldwide level specified in section 1151(e) of this title for diversity immigrants shall be allotted visas each fiscal year as follows:

(A) Determination of preference immigration

The Attorney General shall determine for the most recent previous 5-fiscal-year period for which data are available, the total number of aliens who are natives of each foreign state and who (i) were admitted or otherwise provided lawful permanent resident status (other than under this subsection) and (ii) were subject to the numerical limitations of section 1151(a) of this title (other than paragraph (3) thereof) or who were admitted or otherwise provided lawful permanent resident status as an immediate relative or other alien described in section 1151(b)(2) of this title.

(B) Identification of high-admission and low-admission regions and high-admission and low-admission states

The Attorney General—

(i) shall identify—

(I) each region (each in this paragraph referred to as a "high-admission region")

for which the total of the numbers determined under subparagraph (A) for states in the region is greater than 1/6 of the total of all such numbers, and

(II) each other region (each in this paragraph referred to as a "low-admission region"); and

(ii) shall identify—

(I) each foreign state for which the number determined under subparagraph (A) is greater than 50,000 (each such state in this paragraph referred to as a "high-admission state"), and

(II) each other foreign state (each such state in this paragraph referred to as a "low-admission state").

(C) Determination of percentage of worldwide immigration attributable to high-admission regions

The Attorney General shall determine the percentage of the total of the numbers determined under subparagraph (A) that are numbers for foreign states in high-admission regions.

(D) Determination of regional populations excluding high-admission states and ratios of populations of regions within low-admission regions and high-admission regions

The Attorney General shall determine—

(i) based on available estimates for each region, the total population of each region not including the population of any high-admission state;

(ii) for each low-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the low-admission regions; and

(iii) for each high-admission region, the ratio of the population of the region determined under clause (i) to the total of the populations determined under such clause for all the high-admission regions.

(E) Distribution of visas

(i) No visas for natives of high-admission states

The percentage of visas made available under this paragraph to natives of a high-admission state is 0.

(ii) For low-admission states in low-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of

a high-admission state) in a low-admission region is the product of—

(I) the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(ii).

(iii) For low-admission states in high-admission regions

Subject to clauses (iv) and (v), the percentage of visas made available under this paragraph to natives (other than natives of a high-admission state) in a high-admission region is the product of—

(I) 100 percent minus the percentage determined under subparagraph (C), and

(II) the population ratio for that region determined under subparagraph (D)(iii).

(iv) Redistribution of unused visa numbers

If the Secretary of State estimates that the number of immigrant visas to be issued to natives in any region for a fiscal year under this paragraph is less than the number of immigrant visas made available to such natives under this paragraph for the fiscal year, subject to clause (v), the excess visa numbers shall be made available to natives (other than natives of a high-admission state) of the other regions

in proportion to the percentages otherwise specified in clauses (ii) and (iii).

(v) Limitation on visas for natives of a single foreign state

The percentage of visas made available under this paragraph to natives of any single foreign state for any fiscal year shall not exceed 7 percent.

(F) "Region" defined

Only for purposes of administering the diversity program under this subsection, Northern Ireland shall be treated as a separate foreign state, each colony or other component or dependent area of a foreign state overseas from the foreign state shall be treated as part of the foreign state, and the areas described in each of the following clauses shall be considered to be a separate region:

(i) Africa.

(ii) Asia.

(iii) Europe.

(iv) North America (other than Mexico).

(v) Oceania.

(vi) South America, Mexico, Central America, and the Caribbean.

(2) Requirement of education or work experience

An alien is not eligible for a visa under this subsection unless the alien—

(A) has at least a high school education or its equivalent, or

(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

(3) Maintenance of information

The Secretary of State shall maintain information on the age, occupation, education level, and other relevant characteristics of immigrants issued visas under this subsection.

(d) Treatment of family members

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 1101(b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

(e) Order of consideration

(1) Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the

Attorney General (or in the case of special immigrants under section 1101(a)(27)(D) of this title, with the Secretary of State) as provided in section 1154(a) of this title.

(2) Immigrant visa numbers made available under subsection (c) of this section (relating to diversity immigrants) shall be issued to eligible qualified immigrants strictly in a random order established by the Secretary of State for the fiscal year involved.

(3) Waiting lists of applicants for visas under this section shall be maintained in accordance with regulations prescribed by the Secretary of State.

(f) Authorization for issuance

In the case of any alien claiming in his application for an immigrant visa to be described in section 1151(b)(2) of this title or in subsection (a), (b), or (c) of this section, the consular officer shall not grant such status until he has been authorized to do so as provided by section 1154 of this title.

(g) Lists

For purposes of carrying out the Secretary's responsibilities in the orderly administration of this section, the Secretary of State may make reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year within each of the categories under subsections (a), (b), and (c) of this section and to rely upon such estimates in authorizing the issuance of visas. The Secretary of State shall terminate the registration of any alien who fails to apply for an immigrant visa

within one year following notification to the alien of the availability of such visa, but the Secretary shall reinstate the registration of any such alien who establishes within 2 years following the date of notification of the availability of such visa that such failure to apply was due to circumstances beyond the alien's control.

(h) Rules for determining whether certain aliens are children

(1) In general

For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using—

(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

(2) Petitions described

The petition described in this paragraph is—

(A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or

(B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

(3) Retention of priority date

If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

(4) Application to self-petitions

Paragraphs (1) through (3) shall apply to self-petitioners and derivatives of self-petitioners.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 12-930

Supreme Court, U.S.
FILED
OCT 28 2013
CLERK

IN THE

Supreme Court of the United States

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

When a U.S. citizen, a lawful permanent resident, or an employer petitions the government to issue a lawful permanent resident visa to a close relative or prospective employee (the "principal beneficiary"), the principal beneficiary's children under 21 may also receive visas as "derivative beneficiaries." 8 U.S.C. §1153(d). Aliens are allotted visas based on their "priority date" (usually the date of their petition's filing) and either their relationship to the petitioner (family-preference petitions) or their education and skills (employment petitions). Because of backlogs, it may take years or decades for an alien's priority date to become current, such that a visa is available for her. If a child who is a derivative beneficiary turns 21 before that point (known as "aging out"), the child typically cannot be treated as a derivative beneficiary, but rather must seek a visa by another route, often under a different statutory category as the adult son or daughter of a lawful permanent resident.

The Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002), protects derivative beneficiaries from the consequences of aging out while waiting in the visa line by, among other things, allowing them to retain their original priority date in the new statutory category, rather than assigning them a new, later priority date that disregards the length of time already spent in line.

The question presented is:

Whether the protection extended by the Child Status Protection Act, 8 U.S.C. §1153(h)(3), applies to all derivative beneficiary children.

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IN THE

Supreme Court of the United States

No. 12-930

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

Rosalina Cuellar de Osorio and her family patiently waited seven years for immigrant visas that would allow them to join Ms. Cuellar de Osorio's U.S. citizen mother in the United States. In November 2005, they were notified that they had made it to the front of the visa line. When they appeared at the U.S. Consulate in El Salvador to apply for visas, they were informed that her son Melvin, who had turned 21 in July 2005, could not immigrate to the United States with his family. Ms. Cuellar de Osorio was forced to choose: stay in El Salvador with her son, or pursue the family's dream of immigrating to the United States and hope that Melvin

would soon be reunited with them. Ms. Cuellar de Osorio and her husband are now lawful permanent residents (LPRs); she has petitioned for a visa on behalf of her now-adult son Melvin, but he is still in El Salvador, having waited 15 years and counting.

Congress did not intend for Ms. Cuellar de Osorio to suffer this heartrending separation. Congress enacted Section 3 of the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927, 928 (2002), to ameliorate the impact of both administrative processing delays and visa backlogs on children who turn 21 while awaiting a visa. Congress created a straightforward solution for *all* derivative beneficiaries. If a derivative beneficiary's age, recalculated using a method specified in the statute, is determined to be under 21, then he can still immigrate as a derivative "child" beneficiary and his visa application is approved. If his age is determined to be 21 or over, then he is treated as if his now-LPR parent had petitioned for him as the adult son of an LPR (automatic conversion) but with the same priority date he had before turning 21 (priority date retention). He thus joins the "F2B" visa line for adult sons and daughters of LPRs and, with his original priority date, is eligible to immigrate close in time to the rest of his family. If Melvin were granted that relief as Congress provided, he would immediately receive a visa and could reunite with his parents and grandmother in the United States.

Largely ignoring the benefit at the heart (and in the title) of the provision at issue in this case—"[r]etention of priority date"—the government argues this case as if it were all about "automatic conversion," an ancillary benefit that saves a filing fee but does not limit the statute's clear statement of its broad scope. The government's argument about automatic conver-

sion is based on a mistaken premise; automatic conversion occurs *after* the derivative beneficiary's parent has become an LPR, not (as the government would have it) the moment the child turns 21. Once the timing is properly understood, there are no statutory or practical barriers to providing automatic conversion to all derivative beneficiaries who age out. The government's emphasis on automatic conversion is also inconsistent with its own guidance and administration of the immigration laws, which recognize that beneficiaries may retain their priority dates regardless of whether a petition is automatically converted to a new category or a new petition is filed.

The government tries to justify its misreading of the statute on policy grounds, primarily by mounting an unusual campaign of narrative degradation against Respondents and their children, calling them "line-jumpers" seeking "special" rights to immigrate "ahead of others" and "undermine the goal of family unity." *See* Br. 15, 19, 32, 33, 38, 40, 42, 44, 47, 51. The government's rhetoric masks (though only thinly) the emptiness of its policy arguments—none of which overrides the statute's plain language and Congress's manifest intent to help all derivative beneficiaries who age out. Indeed, most of the government's policy arguments against granting relief to Melvin would apply equally to the subset of aged-out derivative beneficiaries to whom the government *does* grant relief. The Board of Immigration Appeals (BIA) provided no valid reason for that distinction, and the government's post hoc arguments fail on numerous grounds.

The court of appeals' judgment should be affirmed.

STATEMENT

A. Mechanics Of The Immigration System

The CSPA provides specific, practical relief in the context of an established immigration system—a system the government's brief describes only in part. Family-sponsored immigration generally proceeds in three steps: (1) filing and approval of an immigrant petition by a U.S. citizen or LPR ("petitioner") on behalf of a close relative ("beneficiary" or "principal beneficiary") and, where relevant, the relative's spouse and children ("derivative beneficiaries"); (2) filing and approval of visa applications by the beneficiary and derivative beneficiaries; and (3) inspection and admission as LPRs of the principal and derivative beneficiaries.[1] The government provides an overview of step 1 (Br. 2-5), but largely omits steps 2 and 3. Yet it is at *those* steps that the actions implicated by the CSPA—calculation of a derivative beneficiary's age, automatic conversion to a new category, and priority date retention—take place.

1. Immigrant Petition. Family-based immigration begins when a U.S. citizen or LPR files with U.S. Citizenship and Immigration Services (USCIS) a Form I-130, "Petition for Alien Relative." *See* 8 U.S.C. §1154(a)(1); 8 C.F.R. §204.1(a)(1). If the petition satisfies applicable criteria, USCIS "approve[s]" it. 8 U.S.C. §1154(b). Most beneficiaries, however, must wait to re-

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[1] The adjustment of status process for aliens already within the United States is similar (*see infra* pp.8-9), although it "generally combines into a single process the two steps taken in visa processing—application for a visa to a U.S. consular office abroad; and application for admission to an immigration officer at a U.S. port of entry." 4 Gordon et al., *Immigration Law and Procedure* §51.06[1] (2013).

ceive green cards because annual numerical limits make it impossible to issue visas to all approved beneficiaries immediately. *See id.* §1151(c). The length of an alien's wait depends in part on the preference category for the relationship between the petitioner and the principal beneficiary:

F1: unmarried adult sons or daughters of U.S. citizens (id. §1153(a)(1))

F2: F2A: spouses and minor children of LPRs (*id.* §1153(a)(2)(A))

F2B: unmarried adult sons or daughters of LPRs (*id.* §1153(a)(2)(B))

F3: married sons or daughters of U.S. citizens (*id.* §1153(a)(3))

F4: brothers and sisters of U.S. citizens (*id.* §1153(a)(4))

Beneficiaries receive visas within each preference category based on "the order in which a petition in behalf of each such immigrant is filed." *Id.* §1153(e)(1). An alien's place in this "order" is determined by the alien's "priority date," which is the date on which her immigrant petition is filed. 8 C.F.R. §204.1(b); *see, e.g.*, 8 U.S.C. §1153(h)(3). A derivative beneficiary—a spouse or unmarried child under 21—is "entitled to the same status, and the same order of consideration" as the principal beneficiary. 8 U.S.C. §1153(d). A beneficiary may wait decades before a visa becomes available.[2]

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[2] The CSPA also applies to employment-based immigration, which follows an analogous course. A labor certification is issued (if required), and the employer files a Form I-140, "Immigrant Petition for Alien Worker," classifying the prospective employee based on educational background and experience; the employee

2. Visa Application. The State Department publishes a monthly bulletin listing a "cut-off date" for visa availability in each family-preference and employment category. 22 C.F.R. §42.51; State Department, *Visa Bulletin for Nov. 2013* (Oct. 9, 2013). A visa is available when the cut-off date reaches the beneficiary's priority date. Before that point, the National Visa Center (NVC) will contact the beneficiary and prompt her to pay the processing fee, complete a visa application, and provide any required documentation. 22 C.F.R. §42.71; State Department, *Immigrants to the United States*; State Department, *Immigrant Visa Processing—The National Visa Center (NVC)*.

Every prospective immigrant, including each derivative beneficiary, must make a separate visa application. 8 U.S.C. §1202(a); *see also* State Department, Form DS-230, "Application for Immigrant Visa and Alien Registration" (now electronic Form DS-260) (instructing principal beneficiary to complete a separate application for herself and "each member of [her] family, regardless of age, who will immigrate with [her]"). A derivative beneficiary may submit his visa application with the principal beneficiary's application if, for example, the derivative beneficiary is "accompanying" the parent. 22 C.F.R. §40.1(a)(1). If the derivative beneficiary is "following to join" the parent, the derivative beneficiary may apply *after* the parent has entered the United States and become an LPR. As USCIS instructs new LPRs: "If you had children who did not obtain permanent residence at the same time you did,

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must wait for a visa if her priority date is not current for the given category. *See* 8 U.S.C. §1153(b). Once her priority date becomes current, she follows the application and admission steps in the same manner as family-based beneficiaries. 4 Gordon §50.01.

they may be eligible for follow-to-join benefits. ... [Y]ou may simply notify a U.S. consulate that you are a permanent resident so that your children *can apply* for an immigrant visa." USCIS, *Bringing Spouses to Live in the United States as Permanent Residents* (June 8, 2012) (emphasis added); *see also* Customs and Border Protection, *Inspector's Field Manual* ch. 14.3 (2006) (explaining that "[t]here is not necessarily any time limit involved [in following to join] so long as the required relationship still exists"). The derivative beneficiary "may not precede the principal alien to the United States." 22 C.F.R. §40.1(a)(2).

NVC processes visa applications and schedules interviews at the U.S. Embassy or Consulate in the beneficiaries' home country. State Department, *Immigrant Visa Application and Document Processing*. The visa application is not adjudicated before this interview; only at the interview, when beneficiaries personally appear before the consular officer, is the visa application officially "ma[d]e." 22 C.F.R. §40.1(*l*)(2); *see also id.* §42.62(a). The consular officer determines whether the applicant is "eligibl[e] to receive a visa," *id.* §42.62(b), and must either approve or reject the application at the interview, *id.* §42.81(a). *See also* 8 U.S.C. §1201(a)(1). An issued visa ordinarily is valid for no more than six months. *Id.* §1201(c); 22 C.F.R. §42.72(a).[3]

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[3] Because a consular officer generally "'cannot ... hold the visa for future action,'" a case is typically not scheduled for interview "if the documentation is incomplete or the case otherwise unripe for decision." 4 Gordon §55.08[2]. If, however, a visa is refused after the interview on "grounds [that] can be overcome with ... additional evidence," the officer may retain the applicant's documents, *id.* §55.09[2], and the case may be reopened within one year without an additional application fee, 22 C.F.R. §42.81(e).

Importantly, a derivative beneficiary's eligibility for a visa is "determined definitively" at the time of the derivative beneficiary's visa application—*i.e.*, his consular interview. 22 C.F.R. §§42.68(c), 42.62(a). It is accordingly at that interview (and not before) that the derivative beneficiary's age is calculated for purposes of determining visa eligibility. If he is under 21, he can immigrate as a "child" with the "same status, and the same order of consideration" as his parent. 8 U.S.C. §1153(d). If he has turned 21 in the interim—known as "aging out"—he will need the relief provided by the CSPA to immigrate close in time to his parents. *See infra* pp.10-12.

3. Inspection and Admission. An immigrant with a visa must appear at a U.S. port of entry for inspection before the visa expires and still be eligible for the visa at the time of inspection. *See* 8 U.S.C. §1225(a), (b); *Inspector's Field Manual* ch. 14.1. An alien admitted on a "valid unexpired immigrant visa," 8 U.S.C. §1181(a), becomes an LPR (green card holder) immediately upon entering the country. USCIS, *Green Card for a Family Member of a Permanent Resident*; 3 Gordon et al., *Immigration Law and Procedure* §31.03[2] (2013).

Adjustment of Status. Aliens already in the United States may seek "adjustment of status" to LPR through a similar process. *First*, a close relative or potential employer files an immigrant petition for the principal beneficiary (the same petition that is filed for consular processing if the beneficiary is abroad). *See* 8 U.S.C. §1255(a). *See generally* USCIS, *Adjustment of Status* (Mar. 30, 2011). Once that petition has been approved, the beneficiary often must wait for a visa to become available. *See* 8 C.F.R. §245.1(g)(1). *Second*, when a visa becomes available, the beneficiary and any derivative beneficiaries apply for adjustment of status

on Form I-485, "Application to Register Permanent Residence or Adjust Status." A derivative beneficiary's adjustment application may be filed at the same time as the principal's or "anytime after the principal's Form I-485 application is approved." USCIS, *Instructions for I-485* (June 20, 2013). The applicant is then interviewed, if necessary, and the application is adjudicated. 8 C.F.R. §245.6. A derivative beneficiary's application is never adjudicated before the principal's application because, as with consular visa processing, approval of the derivative application is conditioned on approval of the principal's application. *See* 22 C.F.R. §40.1(a)(2); *Matter of Naulu*, 19 I. & N. Dec. 351, 353 (BIA 1986). *Finally*, the applicant is deemed an LPR when the adjustment application is approved. 8 U.S.C. §1255(b).

B. Respondents And Their Children

Respondents' personal histories are varied, but all were the principal beneficiaries of family-based petitions filed by a U.S. citizen parent (F3 petition) or sibling (F4 petition); they also all have children who were under 21 when the petitions were filed.[4] When their priority dates became current and they applied for visas, however, the children were over 21 and no longer eligible to receive visas as derivative beneficiaries. Pet. App. 5a, 11a-12a. Respondents became LPRs and petitioned for their (now adult) children under the "F2B" category—for the adult son or daughter of an LPR—but their children ran the risk of being assigned

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[4] One such child, Ruth Uy, is also a Respondent. To reduce complexity, this brief refers to the principal beneficiaries as "Respondents" and to the derivative beneficiaries, including Ruth Uy, as "Respondents' children."

new, later priority dates and being placed far behind others who had not waited as long as they had.

To illustrate, Ms. Cuellar de Osorio was the principal beneficiary of an F3 petition filed by her mother, a U.S. citizen. Compl. ¶29. The petition listed Ms. Cuellar de Osorio's son Melvin, who was thirteen, as a derivative beneficiary. *Id.* The petition was filed in May 1998 and approved almost two months later, but a visa did not become available until November 2005—four months after Melvin turned 21. *Id.* ¶¶29-30. Ms. Cuellar de Osorio and her husband immigrated in August 2006, leaving Melvin behind in El Salvador. *Id.* ¶30. In July 2007, Ms. Cuellar de Osorio filed an F2B petition for Melvin as the adult son of an LPR. *Id.* ¶32.

Respondent Norma Uy was the principal beneficiary of an F4 petition filed by her U.S. citizen sister in February 1981. Compl. ¶35. The petition listed Norma's daughter Ruth, who was two, as a derivative beneficiary. *Id.* The petition was approved on the day of its filing, but a visa did not become available until more than 21 years later in July 2002, at which point Ruth was 23. *Id.* ¶36. Norma immigrated without Ruth and filed an F2B petition for her. *Id.* ¶¶37-39. The other Respondents are in similar situations.

C. The Child Status Protection Act

Congress recognized and addressed the "aging out" problem when it enacted the CSPA in 2002. Section 3 of the CSPA, entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants," added 8 U.S.C. §1153(h), which tackles the problem in two ways that work together to provide re-

lief for all aged-out derivative beneficiaries. 116 Stat. at 928.

First, paragraph (h)(1) provides that, for purposes of determining eligibility to be a "child" beneficiary—whether principal or derivative—the beneficiary's age is reduced by the time the government took to approve the immigrant petition. (In Melvin Cuellar de Osorio's case, this was almost two months. Pet. App. 11a; Compl. ¶¶29-30.) Paragraph (h)(1) directs the agency to recalculate the derivative beneficiary's age by subtracting the processing delay; if the recalculated age is below 21, then the derivative beneficiary is deemed to "satisf[y] the age requirement" for a "child," 8 U.S.C. §1153(h)(1), and can receive a visa in the same preference category as his parent, *id.* §1153(d), so long as the derivative beneficiary seeks to acquire LPR status within one year of visa availability, *id.* §1153(h)(1)(A).

The child's recalculated age under paragraph (h)(1) is determined when the derivative beneficiary's visa or adjustment application is adjudicated. *See supra* pp.7-8. Specifically, the age recalculation under paragraph (h)(1) occurs *after* "the date on which an immigrant visa number becomes available for such alien (or ... became available for the alien's parent)," 8 U.S.C. §1153(h)(1)(A), and *before* the visa is approved (or refused) for the derivative as a "child," *see id.* §1153(h)(1) (citing *id.* §1101(b)(1)). The timing of the age calculation is important to this case: if it occurs after the parent has become an LPR, an aged-out derivative beneficiary will then be the adult son or daughter of an LPR and thus eligible to immigrate as a principal beneficiary under the F2B category.

Paragraph (h)(1) applies to all petitions described in paragraph (h)(2), which in turn describes (i) F2A pe-

titions on which children are listed as *principal* beneficiaries, *see* 8 U.S.C. §1153(a)(2)(A), (h)(2)(A), and (ii) family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries, *see id.* §1153(d), (h)(2)(B).

Second, paragraph (h)(3), titled "Retention of priority date," provides relief "[i]f the age of an alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3); *see also* Pet. App. 15a, 50a. If that condition is satisfied, then paragraph (h)(3) specifies that "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3). A petition that is automatically converted "shall be regarded as having been approved" in a different family-preference category. 8 C.F.R. §204.2(i) (describing "[a]utomatic conversion of preference classification"). Retention of priority date allows the alien to keep his original priority date when he moves into the F2B category, which means he will be given credit for the time already spent waiting in line.

D. District Court Proceedings

After being admitted as an LPR, Rosalina Cuellar de Osorio asked the government to permit Melvin to retain his May 1998 priority date and to process his F2B petition using that date, consistent with the CSPA. Compl. ¶32. The other Respondents made similar requests. Had the requests been granted, Respondents' children would have been able to immigrate or adjust status years earlier than they otherwise will. The government refused without explanation. *Id.* ¶¶33, 40, 49, 57, 64. Respondents filed this suit, seeking

to compel the government to allow their sons and daughters to retain their original priority dates. At that time, the BIA had recognized that a child listed on an F4 petition filed by her mother's U.S. citizen sister was entitled, after turning 21, to "retain the ... priority date that applied to the original [F4] petition," meaning that "a visa number under the [F2B] category is immediately available to the respondent." *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

In June 2009, however, while this litigation was pending, the BIA issued *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), which disapproved *Garcia* and ruled that an aged-out derivative beneficiary on an F4 petition filed by a U.S. citizen relative could not retain her priority date. The BIA first opined that the CSPA "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* at 33. The BIA next stated (without explanation or support) that the concept of "automatic conversion" was to be analyzed "at the moment the beneficiary aged out," not at the later moment when the beneficiary applied for a visa. *Id.* at 35. The BIA stated that "automatic conversion" had a "recognized meaning" that applied only where "a visa petition converts from one visa category to another ... without the need to file a new visa petition." *Id.* at 34, 35. The BIA also held that "retention" of priority dates applied only to "visa petitions filed by the same family member," whereas a petition "filed by another family member receives its own priority date." *Id.* at 35. The BIA believed that "retention" under the CSPA should be limited to the circumstances in which "retention" was available under prior regulations, which expressly "limited" aging-out relief "to a[n] [LPR]'s son or daughter who was previously eligible as a derivative beneficiary under a second-preference

spousal [F2A] petition filed by that same [LPR]." *Id.* at 34 (discussing 8 C.F.R. §204.2(a)(4)).

The district court treated *Wang* as "dispositive" and granted the government's summary judgment motion. Pet. App. 72a, 83a-84a.

E. Court Of Appeals Proceedings

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. The panel observed that paragraph (h)(3)'s plain language makes clear that it applies to all derivative beneficiaries. Pet. App. 50a. Yet the panel concluded that the statute was ambiguous because, in its view, automatic conversion did not "practicably apply" (*id.* 51a) to Respondents' children since "a new petitioner—the LPR parent—is required" (*id.* 53a). The panel also ruled that "Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion." *Id.* 54a. The panel concluded that the BIA's decision in *Wang* was reasonable. *Id.* 60a.

The court of appeals granted rehearing en banc and reversed. Joining the Fifth Circuit in *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), the en banc court ruled that the BIA's interpretation "conflicts with the plain language of the CSPA," which "unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries." Pet. App. 3a. Like the panel, the en banc court concluded that paragraph (h)(3) "cannot function independently" of the rest of Section 1153(h) and that, when viewed in context, it applied to all derivative beneficiaries, not simply F2A beneficiaries as the BIA had ruled. *Id.* 16a.

The court rejected the government's argument that applying paragraph (h)(3) to F3 or F4 derivative bene-

ficiaries would be "impracticable" because it supposedly required a change in petitioner (from the original U.S. citizen relative to the principal-beneficiary parent who became an LPR). Pet. App. 19a. While the statute's plain language directed a change in policy, it "cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented." *Id.*[5]

SUMMARY OF ARGUMENT

I. Congress unambiguously answered the precise question at issue: paragraphs (h)(1) and (h)(3) provide relief to the same set of beneficiaries, including *all* derivative beneficiaries. Paragraph (h)(1) allows children who have aged out as a result of administrative processing delays to retain their "child" status, and paragraph (h)(3) provides that children who have aged out due to visa backlogs may enjoy priority date retention and automatic conversion benefits. The government agrees that paragraph (h)(1) applies to all derivative beneficiaries who age out. Paragraph (h)(3), in turn, has only one eligibility requirement: the alien's age has been "determined under paragraph (1) to be 21 years of age or older." Thus, any alien who does not qualify for relief under paragraph (h)(1) because his age is determined to be over 21 may obtain paragraph (h)(3)'s benefits, the most important of which is the one reflected in its title—"[r]etention of priority date." By mandating that "*the alien shall* retain the original priority date," paragraph (h)(3) ensures that aged-out derivative bene-

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[5] Five judges dissented. Pet. App. 27a, 28a (Smith, J., dissenting) (acknowledging that the majority's interpretation was "reasonabl[e]," but believing that the "automatic conversion" phrase "complicate[d] matters").

ficiaries will keep their original priority dates when they move into the F2B category as the adult sons and daughters of LPRs, thus receiving credit for the time already spent waiting for a visa.

This plain language interpretation of paragraph (h)(3)'s scope is reinforced by Congress's use of the same terminology in paragraphs (h)(1) and (h)(3) to refer to *all* derivative beneficiaries ("subsection[] ... (d)"). Congress could have imposed the specific limitation the government now favors, but it did not. Although a pre-existing regulation confined aging-out relief to F2A derivative beneficiaries whose new F2B petition was filed by the same petitioner, Congress notably *omitted* any such limitations from paragraph (h)(3), which strongly suggests that those limitations do not apply. The provision's title and legislative history confirm Congress's goal to protect *all* derivative beneficiaries from the consequences of turning 21, not to confine that relief in a way not mentioned in the statute.

II. The government nonetheless seeks ambiguity by asserting a "tension" between paragraph (h)(3)'s sole eligibility requirement and its automatic conversion benefit. But this Court does not stretch to find that Congress enacted a provision at war with itself; rather, it construes statutory provisions to work harmoniously where at all possible. The government accordingly must show both: (1) that it *cannot* provide F3 and F4 derivative beneficiaries with the automatic conversion benefit; and (2) that those derivative beneficiaries *cannot* retain their priority dates without automatic conversion. Both arguments fail.

First, the government is fundamentally wrong in asserting that automatic conversion must occur (if at all) at the moment an alien turns 21. As paragraph

(h)(3)'s initial clause makes clear, automatic conversion does not occur until *after* the alien's age "is determined under paragraph [(h)](1) to be 21 years of age or older." That determination happens when the alien's visa or adjustment application is adjudicated, not before. Accordingly, when properly understood, automatic conversion need not occur until after the derivative beneficiary's parent has become an LPR. At that point, the alien qualifies for the "appropriate" F2B category without the need for a new petition, which is all that is legitimately needed to "automatically ... convert[]" the original petition to the F2B category.

The government's attempts to impose additional requirements for automatic conversion are also unsupported by the statute's plain language and agency practice. The conversion may happen "automatically" even if it is not triggered until an appropriate category is available. And nothing in the word "conversion" excludes the comparably minor change involved in treating an F3 or F4 petition as an F2B petition; it involves a change in petitioner, as do other automatic conversion provisions, but the petition seeks the same benefit for the same person through the same means and is simply regarded as having been filed in a different category. Indeed, the agency has had no trouble implementing automatic conversion in cases indistinguishable from this one.

Second, Respondents' children are entitled to retain their priority dates regardless of whether their original petitions are automatically converted to the F2B category. The statute envisions that the two benefits be treated distinctly: "In the case of A, then B shall be done and C shall be done." Benefit C (priority date retention) thus "shall" be provided if condition A is satisfied (the beneficiary's recalculated age is deter-

mined to be over 21); it is not dependent on B (automatic conversion). No one disputes that Respondents' children satisfy condition A: their ages have been determined to be 21 years or older under paragraph (h)(1). The government's instructions to the public and its personnel confirm that it knows how to grant retention of priority date without automatic conversion.

III. Finally, the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and would not deserve deference even if paragraph (h)(3) were ambiguous. The BIA favors only derivative beneficiaries of F2A petitions, who are closely related to two LPRs, while disfavoring all family-based derivative beneficiaries who are closely related to at least one *U.S. citizen* and one LPR (and often two LPRs). The agency's justifications for this upside-down preference are based on mistaken premises and unsound analysis. The government's post hoc policy justifications fare no better: The government's complaints about granting relief to F3 and F4 derivatives would apply equally to the F2A derivatives the government favors. The government's apparent desire to limit the scope of paragraph (h)(3) to as few aliens as possible cannot justify the particular line the BIA drew.

ARGUMENT

I. THE CSPA UNAMBIGUOUSLY APPLIES TO ALL DERIVATIVE BENEFICIARIES

The BIA's interpretation of the CSPA is reviewed under the doctrine established in *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 842).

"If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). In determining whether Congress has answered that question, the Court "[e]mploy[s] traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), "begin[ning], as always, with the language of the statute," *Duncan* v. *Walker*, 533 U.S. 167, 172 (2001).

The "precise question at issue" here is whether 8 U.S.C. §1153(h)(1) and (h)(3) have the same scope and provide relief to the same set of beneficiaries. The government agrees (Br. 6, 32-33) that paragraph (h)(1) applies to all derivative beneficiaries, but insists that paragraph (h)(3) has a more limited scope that excludes Respondents' children. The statute's plain text forecloses that argument.

The subject of Section 1153(h) is "an alien" who has two opportunities to obtain relief from aging out. The alien's first opportunity arises in paragraph (h)(1), which provides relief for delays caused by agency processing of the immigrant petition. Under paragraph (h)(1), the alien's age is recalculated "[f]or purposes of subsections (a)(2)(A) and (d)"; specifically, the alien's age is reduced by "the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. §1153(h)(1), (h)(1)(B). If the recalculated age is below 21, the alien is still considered a "child" and can immigrate as a principal beneficiary (under "subsection[] (a)(2)(A)") or a derivative beneficiary (under "subsection[] ... (d)"), *id.* §1153(h)(1), so long as he "has sought to" do so within one year, *id.* §1153(h)(1)(A).

Paragraph (h)(1) relief is available to aliens who seek visas under "any petition" described in paragraph (h)(2), which in turn describes two types of petitions where being under 21 matters: (i) an F2A petition for a child as a *principal* beneficiary (child of an LPR), 8 U.S.C. §1153(h)(2)(A); and (ii) a petition where a child "is a *derivative* beneficiary under subsection (d)," and the petition is filed "under subsection (a) [family], (b) [employment], or (c) [diversity]," *id.* §1153(h)(2)(B) (emphasis added). The government does not dispute this interpretation of paragraphs (h)(1) and (2). Br. 6, 32-33.

If the alien's recalculated age under paragraph (h)(1) is still over 21, the statute provides a second opportunity for relief—paragraph (h)(3). Paragraph (h)(3), by its plain language, has only one eligibility requirement: the alien's age has been "determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3); *see* Pet. App. 50a ("[p]aragraph [(h)](3)'s initial clause makes it contingent upon the operation of paragraph (1)"). Thus, paragraph (h)(3) covers all aliens seeking a visa under a petition described in paragraph (h)(2) for whom the paragraph (h)(1) recalculation yielded an age over 21, not just—as the government would have it—beneficiaries of F2A petitions.

The most important benefit provided by paragraph (h)(3) to a derivative beneficiary like Respondents' children is the one captured by its enacted title: "Retention of priority date." By providing that "the alien shall retain the original priority date issued upon receipt of the original petition," paragraph (h)(3) allows "the alien" to keep his priority date in a visa category for adult immigrants (typically F2B, adult son or daughter of an LPR). Paragraph (h)(3) also provides

that the "alien's petition shall automatically be converted to the appropriate category." *See infra* Part II.B (explaining that Respondents' children may practicably benefit from "automatic conversion").

Congress's answer to the precise question at issue—that paragraph (h)(3)'s scope encompasses all derivative beneficiaries whose age is "determined under paragraph [(h)](1)" to be over 21, as opposed to a limited subset of that group—is reinforced by several other "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 446, 448.

First, Congress used the same cross-reference—"subsection[] ... (d)"—in both paragraphs (h)(1) and (h)(3). The government agrees (Br. 6, 33) that paragraph (h)(1)'s reference to "subsection[] ... (d)" encompasses *all* derivative beneficiaries, consistent with the undisputed scope of subsection (d), *see* 8 U.S.C. §1153(d). Paragraph (h)(3)'s cross-reference to subsection (d) should be presumed "to mean the same thing," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), especially when used in such proximity within the statute, *Mohamed* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). Paragraph (h)(2) has the same broad scope, specifically including all petitions under which children can seek a derivative visa. 8 U.S.C. §1153(h)(2)(B) (cross-referencing §1153(d)). These cross-references unambiguously show that paragraph (h)(3) applies to "all visa petitions identified in subsection (h)(2)," if the beneficiary's recalculated age under paragraph (h)(1) exceeds 21. Pet. App. 24a; *id.* 15a-16a, 50a-51a.

The government complains (Br. 32) that Congress chose a "round-about way" of defining paragraph (h)(3)'s scope. The government may believe itself capable of choosing "far more direct" formulations (*id.*), but

that does not establish ambiguity. *See Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue."); *see also Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) ("The disputed regulatory language is complex, but it is not ambiguous[.]"); *Bath Iron Works Corp.* v. *Director, Office of Workers' Comp. Programs*, 942 F.2d 811, 819 (1st Cir. 1991) (Breyer, C.J.) ("The statute, while complex with operative language placed in different sections, is not ambiguous or unclear once its different parts are unscrambled.").[6]

Second, Congress notably omitted from paragraph (h)(3) certain limitations included in an earlier aging-out regulation. A 1992 regulation provided that a derivative beneficiary of an *F2A* petition—the subset of derivatives now favored by the government—could retain his original priority date after aging out "if the subsequent petition is filed *by the same petitioner*." 8 C.F.R. §204.2(a)(4) (emphasis added); 57 Fed. Reg. 41,053, 41,059 (Sept. 9, 1992). But Congress did not limit paragraph (h)(3)'s reach to F2A derivatives in that way; it included petitions under "subsection[] ... (d)," reaching all derivative beneficiaries. Nor did Congress require that a subsequent petition be "filed by the same

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[6] Division among circuits (Br. 20 n.6) does not show ambiguity either. *See RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070-2073 (2012) (affirming Seventh Circuit's interpretation of bankruptcy code provision and finding "no textual ambiguity," despite Third Circuit's ruling that the same provision unambiguously provided the contrary, *see In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 301 (3d Cir. 2010)); *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1355-1356 n.4, 1363 n.12 (2012) ("newly awarded compensation" is unambiguous despite circuit split over its meaning).

petitioner." Congress's omission of these regulatory limitations "strongly suggests" that they do not apply to the CSPA. *See Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978).

Had Congress intended paragraph (h)(3) to benefit only F2A derivative beneficiaries, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010); *see also Nken* v. *Holder*, 556 U.S. 418, 430 (2009). Indeed, Congress elsewhere identified the specific class of people to whom the government now wishes to limit paragraph (h)(3). 8 U.S.C. §1101(a)(15)(V) (limiting certain visas to "an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A)").

Third, the CSPA provision's title expressly indicates that the provision applies to aged-out derivative beneficiaries seeking status as "Employment-Based" immigrants. 116 Stat. at 928. Yet under the government's theory, paragraph (h)(3) does not apply to derivative beneficiaries of employment petitions at all. *See Matter of Patel*, A089726558 (BIA Jan. 11, 2011) (pursuant to *Wang*, derivative beneficiary of an employment petition "would not benefit by the provisions of [paragraph (h)(3)]"). Nothing in the statutory text indicates that Congress intended paragraph (h)(3) to have a far narrower scope than the title of the section adding it describes. *See Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (interpreting statute consistently with its title). To the contrary, paragraph (h)(3) cross-references paragraph (h)(1), which applies to derivative beneficiaries of employment petitions, 8 U.S.C. §1153(h)(1)(B), (h)(2), and paragraph (h)(3) itself expressly applies "for the purposes of *subsection*[] ... *(d)*,"

which likewise includes derivative beneficiaries of employment petitions.

Fourth, the legislative history indicates intent to provide age-out relief to all derivative beneficiaries regardless of whether the age-out problem was caused by processing delays (paragraph (h)(1)) or visa backlogs (paragraph (h)(3)). The legislation's purpose was to "provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available." 147 Cong. Rec. S3275, S3275 (Apr. 2, 2001) (Sen. Feinstein); *see also* H.R. Rep. No. 107-807, at 55 (2003) ("The [CSPA] also extends age-out protection to cover ... Children of Family and Employer-Sponsored Immigrants and Diversity Lottery Winners" (emphasis omitted)). Congress thus intended to address two problems: (1) "the INS was unable to adjudicate the application before the child's 21st birthday" and (2) "growing immigration backlogs in the immigration visa category caused the visa to become unavailable before the child reached his 21st birthday." 147 Cong. Rec. at S3275.[7]

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[7] The government admits (Br. 48) that paragraph (h)(3) addresses "'delay' that results from Congress's own yearly limits on admission." Its efforts to downplay the importance of that goal fail. The government argues (Br. 49 n.16) that Senator Feinstein's reference to visa backlogs occurred before Section 1153(h)(3) was added to the bill, but that is immaterial. The Senator's statement shows that Congress—and the Senate in particular—was concerned with remedying aging-out due to visa backlogs, and there is no reason to think that Congress *changed* its purpose before adding paragraph (h)(3) to the Senate bill. And while the original House bill addressed only administrative processing delay (Br. 48), the House sponsor recognized that the Senate bill broadened the legislation's scope and "ma[d]e it even better," 148 Cong. Rec.

Accordingly, paragraph (h)(3) applies broadly to all derivative beneficiaries who satisfy the paragraph's single condition precedent—their recalculated age is "determined under paragraph [(h)](1)" to be over 21. Pet. App. 15a-16a, 24a; *Khalid* v. *Holder*, 655 F.3d 363, 370-371 (5th Cir. 2011). Respondents' children undisputedly fall into that category.

Indeed, the agency has had no difficulty implementing the statute to allow derivative beneficiaries of F3 and F4 petitions to retain their priority dates and immigrate close in time to their families. *See, e.g.*, *Matter of Motong*, A89620887 (IJ Oct. 3, 2008) (immigration judge explaining that "CSPA allows the [derivative beneficiary of F3 petition] to retain her original visa petition priority date" and "'automatically convert[s]'" her petition to "family 2B category"); *Vithalani Welcome Notice*, A089365136 (USCIS Sept. 9, 2008) (granting aged-out derivative beneficiary of F4 petition retention of priority date and adjustment of status in F2B category); *Matter of Garcia*, 2007 WL 2463913 (BIA July 24, 2007) (granting aged-out derivative beneficiary of F4 petition retention of priority date "by virtue of section [1153](h)(3)"); *Matter of M.K.*, A96196186 (IJ June 18, 2007) (granting adjustment of status in F2B category based on retention of priority date for aged-out derivative beneficiary of F4 petition); *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006) (holding that F4 petition was "automatically converted" into an F2B petition and the derivative beneficiary was "entitled to

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H4989, H4992 (July 22, 2002) (Rep. Gekas). Another CSPA provision also addresses backlog delay, not just processing delays. 116 Stat. at 929 (codified at 8 U.S.C. §1154(k) (addressing visa backlogs by allowing married son or daughter to retain priority date when parent naturalizes and either to move from F2B to F1 or to remain in F2B category to avoid longer F1 backlogs)).

retain the ... priority date that applied to the original [F4] petition, and therefore a visa number under the [F2B] category is immediately available"). And after the Fifth Circuit held in 2011 that paragraph (h)(3)'s benefits unambiguously apply to all derivative beneficiaries, *see Khalid*, 655 F.3d at 370-371, the government did not seek this Court's review; it has presumably complied with that precedent as to aged-out derivative beneficiaries in that immigrant-rich circuit.

As the remainder of this brief shows, the government's efforts to create "tension" or ambiguity in Congress's statutory scheme fail.

II. The Government's Claim Of Ambiguity Lacks Merit

A. The Government Must Show That Implementing Congress's Plain Command Regarding Paragraph (h)(3)'s Scope Would Necessarily Conflict With Another Clear Statutory Directive

The government does not argue that Congress left a "gap" for the BIA to fill or used a general term for the BIA to make more specific through adjudication. Congress specified what "an alien" needs to do to qualify for paragraph (h)(3) relief: he must have had his age "determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section." 8 U.S.C. §1153(h)(3). Thus, as even the vacated panel decision below recognized, any ruling that paragraph (h)(3)'s scope is narrower than all derivative beneficiaries meeting that criterion would have to be reached "[d]espite this plain language." Pet. App. 51a.

The government claims (Br. 17) the agency may limit paragraph (h)(3)'s scope based on "tension" it identifies "between the two halves of Section 1153(h)(3)" (*see id.* 33). Congress, however, does not ordinarily enact a single provision with "tension between [its] two halves" (Br. 17; *see id.* 33), which is why, "'if possible,'" courts will construe a statute to "'fit ... all parts into an harmonious whole,'" *Brown & Williamson Tobacco*, 529 U.S. at 133 (quoting *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959)). Even in cases involving distinct provisions enacted at different times, this Court has found such "tension" only where two *unambiguous* statutory commands conflict so squarely that applying the plain meaning of one would effectively repeal the other. *See National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664-666 (2007); *see also id.* at 669-671 (a statute granting discretion must yield when it conflicts with the clear command of another statute). Thus, the government's asserted "tension" exists only if implementing Congress's clear directive regarding paragraph (h)(3)'s scope causes some unavoidable conflict with another equally clear statutory command, such that one of them "must give way." *Id.* at 666; *see also* Pet. App. 51a (panel finding statute ambiguous only after concluding that the statute's "plain language ... 'leads to unreasonable or impracticable results'"). The government accepts that burden, promising to show that the judgment below "cannot be reconciled" (Br. 21 (argument heading)) with other aspects of the paragraph.

The government rests its claim of "tension" almost entirely on paragraph (h)(3)'s reference to "automatic conversion," from which it draws two propositions: (1) that F3 and F4 derivative beneficiaries cannot benefit from automatic conversion at all; and (2) that only de-

rivative beneficiaries who can benefit from automatic conversion may benefit from retention of priority date. For the government to drag Congress's plain statement of paragraph (h)(3)'s scope into ambiguity, *both* of those propositions must *necessarily* be correct.

As it happens, neither of the government's propositions is correct. There is nothing impractical about applying automatic conversion to F3 and F4 derivative beneficiaries. And even if it were otherwise, reading the statute as an "'harmonious whole,'" *Brown & Williamson*, 529 U.S. at 133, requires construing paragraph (h)(3) to provide for priority date retention separately from automatic conversion, which the statute readily permits. The government's search for ambiguity thus fails, and the statute should be applied over its full scope as written.

B. Automatic Conversion Can Be Applied To F3 And F4 Derivative Beneficiaries

1. The BIA identified no valid reason why F3 and F4 petitions cannot be automatically converted to another category

The BIA identified three and only three features that it believed were essential to "automatic conversion" under paragraph (h)(3). However, one of them—the notion that conversion happens, if at all, "at the moment the beneficiary age[s] out," *Matter of Wang*, 25 I. & N. Dec. 28, 35 (BIA 2009)—is inconsistent with the statutory language and the visa process. The BIA's error led it to conclude mistakenly that "no category exists" into which a non-F2A derivative beneficiary's petition could be converted. *Id.* Properly understood, however, automatic conversion occurs after the principal beneficiary becomes an LPR. At that time, F3 and F4 derivative beneficiaries plainly satisfy the BIA's

two remaining criteria—that the derivative beneficiary's visa petition can move "from one visa category to another ... without the need to file a new visa petition" and that the derivative beneficiary qualifies for an appropriate visa category, *id.*

Nothing in the words "automatically be converted" or the CSPA's use of them requires that conversion occur only "at the moment" when a derivative beneficiary turns 21. Indeed, the statute provides the contrary: Paragraph (h)(3) does not operate, and so automatic conversion cannot occur, until after the derivative's age "*is determined under paragraph (1)* to be 21 years of age or older." 8 U.S.C. §1153(h)(3) (emphasis added). That "determin[ation]" does not happen on the derivative's twenty-first birthday; the statute provides that it *cannot* be calculated until after "the date on which an immigrant visa number became available for the alien's parent." *Id.* §1153(h)(1)(A). And the government's practice is to perform the paragraph (h)(1) determination only when the derivative beneficiary's visa or adjustment of status application is adjudicated. *See* State Department, 9 *Foreign Affairs Manual* ch. 42.42 n.12.4 (directing consular officials when adjudicating visa petitions, 22 C.F.R. §42.42, to calculate a derivative beneficiary's "CSPA age" as of the date the visa became available); USCIS, *Adjudicator's Field Manual* ch. 21.2(e) (2013) (same for adjustment of status).

Thus, the *earliest* that automatic conversion can occur is when a derivative beneficiary's visa or adjustment application is adjudicated and his age is recalculated under paragraph (h)(1). That often happens *after* the derivative beneficiary's parent becomes an LPR, and can always be delayed until then. Once that happens, the two other requirements the BIA identified are easily met by F3 and F4 derivative beneficiaries.

First, the derivative beneficiary has a qualifying F2B relationship as the adult son or daughter of an LPR, thus there is an "appropriate" visa category for his or her petition to move into. *See Wang*, 25 I. & N. Dec. at 35. *Second*, no "new visa petition" need be filed, *id.*: The derivative beneficiary's original F3 or F4 petition can simply be "regarded as having been approved" as an F2B petition, *see* 8 C.F.R. §204.2(i).

There are, moreover, several options for ensuring that automatic conversion does not happen before the principal-beneficiary parent becomes an LPR. The derivative may apply for adjustment of status or for a "following to join" visa, neither of which is *ever* adjudicated before the principal beneficiary becomes an LPR. *See supra* pp.6-7, 8-9; *Matter of Naulu*, 19 I. & N. Dec. 351, 353 (BIA 1986); *see also* 22 C.F.R. §40.1(a)(2). Or the derivative beneficiary can apply for an "[a]ccompanying" visa *after* the principal beneficiary has already immigrated. 22 C.F.R. §40.1(a)(1); Customs and Border Protection, *Inspector's Field Manual* ch. 14.3 (2006). Even if the derivative beneficiary's visa application is received before the principal beneficiary has immigrated, no interview need be scheduled until after the parent becomes an LPR. *See* 4 Gordon et al., *Immigration Law and Procedure* §55.08[2] (2013) ("[I]f the documentation is incomplete or the case otherwise unripe for decision, the case is not normally scheduled for interview."); *cf. Adjudicator's Field Manual* ch. 21.2(e)(4) (instructing officials to defer adjudication of adjustment application in certain circumstances); *see also supra* n.3. Or the official could reject the application and the derivative beneficiary could reapply after the principal beneficiary immigrates. *See* 22 C.F.R. §42.81(e); *Foreign Affairs Manual* ch. 42.81 n.4.3; *see also supra* n.3.

Accordingly, once automatic conversion is properly understood as happening *after* the principal beneficiary is an LPR, nothing prevents the agency from automatically converting the derivative beneficiary's F3 or F4 petition to an F2B petition under paragraph (h)(3).

This implementation is consistent with the ordinary meaning of the statutory language and longstanding regulatory practice. "Automatic" typically means "having the capability of starting, operating, moving, etc., independently." *Random House Dictionary of the English Language* 140 (2d ed. 1987). Benefits available automatically are thus provided without the beneficiary having to request them, as, for example, when a federal employee is automatically enrolled in a health care or retirement plan. *E.g.*, 5 U.S.C. §8432. "Automatic conversion" relieves the beneficiary of the need to arrange for a new petition, instead allowing the agency to "regard" the original F3 or F4 petition "as having been approved" in the F2B category. *See* 8 C.F.R. §204.2(i).[8]

The statute provides, moreover, for conversion "to the *appropriate* category." 8 U.S.C. §1153(h)(3) (emphasis added). As relevant here, "appropriate" means "suitable or fitting for a particular purpose." *Random House Dictionary* 103. In the family immigration system, whether a family-preference category is suitable or fitting depends on the alien's age and marital status

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[8] The government expends substantial energy (Br. 21-26, 30-31) explaining why automatic conversion is inconsistent with the filing of a new petition. While automatic conversion should make a new petition *unnecessary*, that does not mean that the filing of a new petition makes automatic conversion *impossible*. Indeed, the government itself appears to *require* new petitions even from the F2A derivative beneficiaries *it concedes* can benefit from automatic conversion. *See infra* pp.42-43.

and whether he has a qualifying relationship. *See* 8 U.S.C. §1153(a)(1)-(4). Because aged-out derivative beneficiaries of F3 and F4 petitions can satisfy the F2B criteria as soon as their parent becomes an LPR, they have a new category "appropriate" to them at that point.

2. The government's newly minted "requirements" for automatic conversion are unsupported

The government fashions a pair of additional "requirements" for automatic conversion not mentioned in *Wang*. *First*, the government contends (Br. 24-27) that there can be no "gap" in the beneficiary's eligibility between his twenty-first birthday and when automatic conversion occurs. *Second*, the government argues (*id.* 22, 24-27) that conversion may not involve any change in the "fundamental" or "essential character" of the petition, by which the government appears to mean that conversion cannot require a new petitioner. Neither new "requirement" is supported by the statute's language or immigration practice.

a. The government invokes a "gap" in "eligibility for a family-preference category" (Br. 24) that exists for F3 and F4 derivative beneficiaries but not for F2A derivative beneficiaries during the period between the derivative's twenty-first birthday and his parent's immigration. It is true that an F2A derivative beneficiary could potentially qualify for the F2B category during this time. But that has no practical effect. After reaching age 21, *no* derivative beneficiary (even an F2A derivative) is eligible to immigrate on the only petition that has been approved (the F2A, F3, F4, or employment petition) because he is no longer a "child." Only after becoming subject to an F2B petition, whether

through automatic conversion or the LPR parent's filing of a new petition, is any aged-out derivative beneficiary eligible to obtain a visa on an approved petition. And automatic conversion occurs not when the derivative beneficiary turns 21, but rather after the derivative beneficiary's age is "determined" using paragraph (h)(1)'s formula. *See supra* pp.29-30. Thus, to the extent any eligibility "gap" could be relevant, it exists in every case, including F2A cases. The government does not view that gap as disqualifying in the case of F2A derivative beneficiaries; there is no reason to treat it as disqualifying for F3 and F4 derivative beneficiaries.

The government finds its new "requirement" that beneficiaries experience no "gap" in eligibility from the statute's use of the word "automatically," which the government urges (Br. 26) should mean that conversion happens "immediately." But even accepting that meaning, there are several ways to ensure that an F3 or F4 derivative's petition can be converted immediately by managing the timing of the "determin[ation]" of the alien's age under paragraph (h)(1). *See supra* p.30; 4 Gordon §55.08[2]; *see* 22 C.F.R. §42.81(e).

In any event, the government's equation of "automatically" and "immediately" is mistaken. Although something "automatic" may happen right away, it also may be triggered at a "predetermined point" in the future. *See Webster's Third New International Dictionary* 148 (3d ed. 2002) (defining "automatic" to mean "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation"). An automatic sprinkler does not go off until it detects excess heat or smoke. Automatic payments for a mortgage are not made until the beginning of each month. An automatic enrollment benefit may not be available until after a thirty-day probationary

period. The same is true under "automatic conversion" regulations that preceded the CSPA: before an F2A petition's "[a]utomatic conversion" to an immediate relative petition after the petitioner's naturalization, 8 C.F.R. §204.2(i)(3), the petitioner must first submit proof of U.S. citizenship, State Department, *If You Were an LPR and Are Now a U.S. Citizen; Upgrading a Petition*. Thus, any need to wait until an "appropriate category" becomes available would not make the later conversion any less automatic; it simply means that, at that time, no new petition need be filed.[9]

b. The government conjures (Br. 22) a further "requirement" from the word "converted," which it interprets to preclude any "alteration in the essential character" of the "alien's petition." But treating an F3 or F4 derivative beneficiary's petition like an F2B petition is not a radical change. Pre- and post-conversion, the petition seeks the same benefit (permanent residency for the child) through the same means (family-sponsored immigration) involving two of the same people (parent and child). The only difference is that the parent and child take on new roles—the parent as petitioner, the child as principal beneficiary. Yet it preserves "the same basic relationship" relied upon by the former derivative prior to conversion. *Cf.* Br. 22.

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[9] The government does not argue that the use of "shall" in "shall automatically be converted" means that conversion must occur immediately, and properly so: as this Court has held *at the government's urging*, the use of "shall," even when paired with an express deadline, does not preclude later action. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003); U.S. Reply Br. 4-10, *Barnhart*, Nos. 01-705 & 01-715 (July 22, 2002).

Moreover, the government itself defines "converted" as "to be transformed in some way." Br. 22. And "transform" clearly can encompass significant changes. *Webster's Third New International Dictionary* 2427 ("to change completely or essentially in composition or structure"). While we cannot "convert" water into stone or wood as a matter of science (Br. 22), we can "convert" wood into stone (petrifaction) and water into hydrogen and oxygen gas (electrolysis). *See McGraw-Hill Dictionary of Scientific and Technical Terms* 1481 (5th ed. 1994) ("petrifaction" involves "*converting* [organic materials] to a stony substance"); de Levie, *The Electrolysis of Water*, 476 J. Electroanalytical Chem. 92, 92 (1999); *see also* National Park Service, *History, Petrified Forest National Park* (upon discovering Arizona's Petrified Forest in 1853, Lt. Amiel Weeks Whipple wrote: "Quite a forest of petrified trees was discovered to-day ... They are *converted* into beautiful specimens of variegated jasper." (emphasis altered)); *see also Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 744 (1945) (equating "the conversion of dextrose into candy" with "treatment of materials to be transformed or reduced to a different state or thing"); *Campbell* v. *United States*, 107 U.S. 407, 411 (1883) (referring to linseeds "converted into cake"). Treating an F3 or F4 petition as approved in the F2B category is far less of a transformation than these "conversions."

The government objects (Br. 27) that converting to an F2B petition requires "'editing the original petition,'" but no actual editing (in the sense of crossing out or adding words) is required. Automatic conversion has always been *constructive*: When adjudicating an alien's visa or adjustment application, the relevant official simply "regard[s] [the original petition] as having been approved" in the new category. 8 C.F.R. §204.2(i).

Even if converting from the F3 or F4 category to the F2B category required actual editing, it would be comparable to what the government already does in other contexts. To convert an F2A derivative beneficiary's petition to an F2B petition (which the government agrees paragraph (h)(3) allows), the government must "cross out" information describing the former principal beneficiary under F2A (the LPR petitioner's spouse) and fill in equivalent information about the new principal beneficiary under F2B (the now-adult son or daughter). Similarly, "[a]utomatic conversion" of a spousal petition to a widow(er) petition upon the petitioner's death requires conversion to an entirely new form with a different petitioner. *See* 8 C.F.R. §204.2(i)(1)(iv) (spousal Form I-130 petition "must be regarded, upon the death of the petitioner, as having been approved as a Form I-360" widow(er) self-petition).[10]

The government's contention that "conversion" cannot involve a change in petitioner fails for similar reasons. Indeed, paragraph (h)(4)—which extends paragraph (h)(3)'s automatic conversion and priority date retention benefits to "derivatives of self-petitioners"—necessarily envisions conversions with a change in petitioner. For example, if a battered spouse includes her child as a derivative beneficiary on a self-petition, the petition converts to a self-petition for the child when he ages out. *See* 8 U.S.C. §1154(a)(1)(D)(i)(III); *see also* Mem. from Yates to Regional Directors, regarding Age-Out Protections Afforded Battered Children Pur-

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[10] The government's dubious suggestion (Br. 27-28) that immigrating parents might not want all of their children to immigrate with them is no reason to construe the CSPA narrowly. As the government acknowledges (*id.* 28), if any such situation arises, the parent may simply withdraw the converted petition. *See* 8 C.F.R. §103.2(b)(6).

suant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act, HQOPRD 70/6.1.1 (Aug. 17, 2004).[11] Similarly, if a U.S. citizen dies before a spousal petition is approved, converting the petition to a widow(er) petition requires substituting the surviving spouse as the petitioner. 8 C.F.R. §204.2(i)(1)(iv). That regulation, promulgated a few years after CSPA's enactment (*see* 71 Fed. Reg. 35,732, 35,749 (June 21, 2006)), strongly suggests that "automatic conversion" had no settled meaning requiring that the petitioner remain the same.

The government ignores these provisions, relying instead (Br. 28-31) on provisions where the petitioner does remain the same. But these usages show only that the petitioner is the same in those specific contexts; they do not show that automatic conversion *cannot work* with different petitioners where the provision so directs. *See Carcieri* v. *Salazar*, 555 U.S. 379, 391 (2009) ("[T]he susceptibility of [a] word ... to alternative meanings 'does not render the word ... whenever it is used, ambiguous,' particularly where 'all but one of

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[11] Below, the government sought to avoid paragraph (h)(4) by arguing that the Battered Immigrant Women Protection Act of 2000 (BIWPA), which first provided age-out protections to derivatives of self-petitions, does not use the word "conversion." Appellee's C.A. Br. 43-44. But BIWPA plainly employs the same *mechanism* as 8 C.F.R. §204.2(i), the very title of which provides for "[a]utomatic conversion." *Compare* BIWPA, Pub. L. No. 106-386, §1503(d)(2), 114 Stat. 1464, 1522 ("Any derivative child who attains 21 years of age ... *shall be considered* ... a petitioner for preference status under ... [the] applicable [visa category]" (emphasis added)) (codified at 8 U.S.C. §1154(a)(1)(D)(i)(III)), *with* 8 C.F.R. §204.2(i)(2) (2000) (an immediate relative petition "*shall be regarded* as having been approved for preference status under [1153(a)(1)] as of the beneficiary's twenty-first birthday" (emphasis added)).

the meanings is ordinarily eliminated by context.'" (quoting *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993)).

Once automatic conversion is examined at the correct moment in time—when the visa or adjustment application is adjudicated and the derivative beneficiary's parent has become an LPR—all legitimate requirements of automatic conversion are satisfied. There is accordingly no "tension" between automatic conversion and Congress's directive that paragraph (h)(3) be applied to all derivative beneficiaries, and certainly no clear conflict that would require that directive to "give way." *National Ass'n of Home Builders*, 551 U.S. at 666.

C. Paragraph (h)(3) Allows Retention Of Priority Date Without Automatic Conversion

The second pillar of the government's proposed "tension" is its claim that only aliens who can enjoy "automatic conversion" can enjoy retention of priority date. That pillar does not bear any weight either. "Retention of priority date"—the remedy mentioned in paragraph (h)(3)'s heading—is available to all derivative beneficiaries whose recalculated age under paragraph (h)(1) is at least 21, regardless of whether the beneficiary's petition is automatically converted. For this reason, even if the government is right about automatic conversion (which it is not), Respondents' children are entitled to retain their original priority dates with respect to their more recently filed F2B petitions.[12]

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[12] Because the BIA never considered whether retention of priority date is independent of automatic conversion, no deference

Paragraph (h)(3) contains only one eligibility criterion: "the age of [the] alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." Once that condition is satisfied, two separate benefits accrue: *First*, "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. §1153(h)(3). *Second*, "the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* In other words, the statute provides: "In the case of A, then B shall be done and C shall be done." This sentence structure shows that C is not dependent on B. (A ship's captain who instructs the crew "if the boat takes on water, then you shall operate the bilge pump and you shall distribute life jackets" is not directing that life jackets be withheld if the bilge pump is inoperable.)

Where the word "and" connects two clauses conferring distinct benefits, those clauses operate independently. In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), this Court considered Section 506(b) of the Bankruptcy Code, which provides: "'[T]here shall be allowed to the holder of such claim, [1] interest on such claim, and [2] any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'" (First alteration in original.) But even though a creditor was not entitled to the second benefit—"'reasonable fees, costs, or charges provided for under the agreement'"—because the claim did not arise under an agreement, the creditor was entitled to the first benefit (interest) because, "[b]y the plain language of the statute, the two types of recovery are distinct." *Id.* at 242; *see also Chisom* v. *Roemer*,

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is owed on this question. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the conjunction "and" may mean "*either*" as in "the First Amendment—which reads 'Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,' ... [but] has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

The government cites *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), but the statute at issue there had the following structure: If A and B and C and D, then E shall be done. *Id.* at 57-59. It is, of course, correct that multiple *conditions precedent* joined by "and" must all be satisfied to produce the consequence; that is the basis for *Crooks*' holding. *See id.* at 59 (emphasizing that the statute's "*conditions* [were] expressed conjunctively" (emphasis added)). But paragraph (h)(3)'s structure is entirely different: In the case of A, then B shall be done and C shall be done. A provision making B and C contingent on A does not make C contingent on A and B.

The fact that an alien's retention of his priority date can be a "distinct" benefit from automatic conversion of a petition is reinforced by three further textual features. *First*, Congress used the word "shall" twice, distributing its mandate separately to both benefits ("the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date" (emphases added)). This syntax emphasizes that retention of priority date is separately mandated from automatic conversion. *See National Ass'n of Home Builders*, 551 U.S. at 661 (use of "shall" is "mandatory" and "generally indicates a command that admits of no discretion on the part of the

person instructed to carry out the directive" (internal quotation marks omitted)).

Second, the two clauses have different subjects. While "the alien's *petition*" is automatically converted, it is "*the alien*" who retains his priority date. 8 U.S.C. §1153(h)(3) (emphases added). The government ignores this statutory language, claiming without basis (Br. 36) that "[a] priority date is a feature of a petition"—an assertion not even supported by the provision the government cites, which simply states that the petition's filing date "will constitute the priority date." 8 C.F.R. §204.1(b). Even the government does not observe its own usage, referring in unguarded moments to priority dates as belonging to people: "*the principal beneficiary* receives a place in line," "beneficiaries ... *whose* priority dates," "*principal beneficiary's* priority date," "*her* original priority date," "an *alien* ... with a priority date." Br. 4, 5, 9, 41 (emphases added).[13]

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[13] Other examples abound. *See, e.g.*, 8 C.F.R. §204.2(a)(4) ("The child will be accorded ... the same priority date as the principal alien. ... Such retention of priority date will be accorded only to a son or daughter[.]"); 8 U.S.C. §1154(k)(3) ("[I]f an unmarried son or daughter ... was assigned a priority date ... he or she may maintain that priority date."); 22 C.F.R. §42.51(b) ("priority dates of visa applicants"); *id.* §42.53(a) ("[t]he priority date of a preference visa applicant"); *id.* §42.53(c) ("A spouse or child ... shall be entitled to the priority date of the principal alien[.]"); 8 C.F.R. §204.2(i)(1)(i) ("[t]he beneficiary's priority date"); *id.* §214.15(g)(4)(i) (referring to an alien who "has a current priority date but does not have a pending immigrant visa abroad or application for adjustment of status"); *id.* §1245.9(j) ("[t]he applicant's priority date"); *see also Visa Bulletin for Nov. 2013* ("Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below." (emphasis omitted)).

Third, the priority date retained is the one "issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3). The government reads "original petition" (Br. 26-27 n.7) to refer to a "single petition *prior to* its conversion ... in its 'original' state." But as the Ninth Circuit explained, "original petition" actually "suggests the possibility of a new petition." Pet. App. 20a. Because, as all agree, automatic conversion obviates the filing of a new petition, the suggestion that retention of priority date may involve a *new* petition reinforces the conclusion that retention is distinct from automatic conversion.

The government never argues that retention of priority date *could not possibly* be a distinct benefit, and for good reason. Before CSPA, the only age-out protection available to any family-preference derivative beneficiary was retention of priority date *without* automatic conversion. 8 C.F.R §204.2(a)(4). Other provisions likewise decouple the two. *See, e.g.*, 8 C.F.R. §§204.2(h)(2), 204.5(e), 204.12(f)(1); USA PATRIOT Act, Pub. L. No. 107-56, §421(c), 115 Stat. 272, 357 (2001); *see also* Br. 36 n.12. Section 6 of CSPA itself added 8 U.S.C. §1154(k), which guarantees priority date retention but makes conversion optional.

Indeed, the government's own implementation of paragraph (h)(3) confirms that priority date retention can occur without automatic conversion. Responding to a question about paragraph (h)(3), USCIS has instructed the public:

> In regards to F2A preference cases, ... when the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, *a separate petition will be required.* In such a case, the original priority date will be re-

> tained if the subsequent petition is filed by the same petitioner.

USCIS, *Question & Answer, USCIS National Stakeholder Meeting* 1 (May 27, 2008) (emphasis added). The government instructs its own officials similarly. *Adjudicator's Field Manual* ch. 21.2(c)(5) (requiring "a separate petition" for an aged-out "second preference beneficiary" to "retain the original priority date").[14] In other words, the government is essentially denying *everyone* the benefit of automatic conversion, requiring even F2A derivative beneficiaries to procure a "separate petition" in order to retain their priority date. Whether or not this is proper—it suggests that the government may be collecting additional filing fees from F2A derivative beneficiaries who, by its own argument, should not have to pay (Br. 45-46)—there is no reason why this decoupling of paragraph (h)(3)'s two benefits cannot be applied to F3 and F4 derivatives without the sky falling. The government's assertion that the "[f]irst" benefit of paragraph (h)(3) is to relieve F2A derivative beneficiaries of the need to file an "additional petition (and corresponding fee)" (*id.*) is strange, given that the structure, title, purpose, and history of the provision make clear that Congress sought to

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[14] This guidance predates CSPA's enactment and was apparently first meant to implement 8 C.F.R §204.2(a)(4). Since the CSPA was enacted, the government has repeatedly updated its manuals and provided guidance on paragraph (h)(1), but has never offered any new direction regarding paragraph (h)(3). *See, e.g.*, Mem. from Neufeld to Field Leadership, HQ DOMO 70/6.1 (2008); State Department, Cable, 03-State-144246 (May 2003); Mem. from Williams to Regional Directors et al., HQADN 70/6.1.1 (Sept. 20, 2002); State Department, Cable, 02-State-163054 (Sept. 8, 2002).

remedy far more than a filing fee. Indeed, Respondents would pay (and have already paid) the extra filing fee for an F2B petition in order to retain their children's priority dates and hasten their families' reunification, regardless of automatic conversion.[15]

The government contends (Br. 35) that automatic conversion without retention of priority date would leave a beneficiary's priority date "unclear." That is a red herring; Respondents have never suggested that someone might qualify for automatic conversion under paragraph (h)(3) but not priority date retention. Nor is there any reason to believe that any beneficiary would want the former without the latter: at best, automatic conversion saves a few hundred dollars, whereas retention of priority date avoids years of separation from loved ones. And even if automatic conversion must carry retention of priority date with it, that does not prove that retention of priority date cannot also travel alone.

Finally, the government argues (Br. 37) that it has "'*always*'" conditioned retention of priority date on there being no change in petitioner between the original and any successive petition. (Emphasis added.) That is simply false. Several regulations allow beneficiaries to retain their priority dates

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[15] The government's considerable experience with aliens' retaining their priority dates for use with a newly filed petition casts doubt on its ominous prediction (Br. 36) that allowing retention here would create "considerable uncertainty" and "odd results." If allowing individuals to retain their priority dates without automatic conversion is so dangerous, one would have expected some evidence of this "oddity," at least in the Fifth Circuit after *Khalid* and nationwide between the BIA decisions in *Garcia* (2006) and *Wang* (2009).

even with a change in petitioner. *See, e.g.*, 8 C.F.R. §204.2(h)(2) (permitting an alien whose abusive parent or spouse petitioned on her behalf "to transfer the visa petition's priority date to [a later-submitted] self-petition"); *id.* §204.5(e) ("A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for *any subsequently filed petition* for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify." (emphasis added)); *id.* §204.12(f)(1) (providing that a "physician beneficiary" who finds a *new employer* or establishes her own practice must submit a new Form I-140 but "will retain the priority date from the initial Form I-140"); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, §9(b), 90 Stat. 2703, 2707 ("Any petition filed by, or in behalf of, [an alien formerly classified as a 'Western Hemisphere' immigrant] to accord him a preference status under section 203(a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien.").

There is, accordingly, no reason why aged-out beneficiaries may not "retain," *i.e.*, "hold or continue to hold," what they already have—the priority date they were entitled to as derivative beneficiaries of the original petition. *See Board of Trs. of Leland Stanford Jr. Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2197 (2011) (the "common meaning of 'retain'" is simply "'to hold or continue to hold in possession or use'" (quoting *Webster's Third New International Dictionary* 1938)).

Importantly, to prove the "tension" with which the government seeks to taint paragraph (h)(3) (Br. 17), the government cannot simply assert that the statute *could* be read to condition priority date retention on automat-

ic conversion. In order to render ambiguous the statute's plain language regarding its scope, the government must show that priority date retention *cannot* exist without automatic conversion. Otherwise, the answer is simple: the agency must apply priority date retention in a way that comports with the breadth that Congress plainly gave to paragraph (h)(3)—namely by allowing all derivative beneficiaries to retain their priority dates, even if they cannot benefit from "automatic conversion" and must file new petitions. *See National Ass'n of Home Builders*, 551 U.S. at 664-666; *Carcieri*, 555 U.S. at 391. As shown above, there is no reason why the government cannot do just that here.

III. THE BIA'S INTERPRETATION IS UNREASONABLE

The government spends a remarkable ten pages on policy arguments, claiming the mantle of "family unity" (Br. 37-47) even as it separates Respondents and their children for years. The government's policy assertions are no reason to disregard the CSPA's plain language; if anything, they only confirm that the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and therefore not entitled to deference. *Chevron*, 467 U.S. at 843-844; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983).[16]

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[16] Whether analyzed under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or the second step of *Chevron*, 467 U.S. at 843, the standard is the "same": whether the BIA's policy is "arbitrary or capricious in substance." *Judulang* v. *Holder*, 132 S. Ct. 476, 483 n.7 (2011) (internal quotation marks omitted)

A. The BIA's Stated Rationales Are Erroneous And Inadequate

The BIA's interpretation of paragraph (h)(3) grants relief to certain aliens who are closely related to two LPRs (the F2A sponsor and the principal F2A beneficiary) while excluding all family-based derivative beneficiaries who are closely related to at least one U.S. citizen and one LPR (the citizen sponsor and the LPR principal beneficiary). As this Court recently emphasized, the BIA may disfavor a particular class of aliens—in this case, children with a demonstrated relationship to a U.S. citizen—only if it grounds the decision in "the purposes and concerns of the immigration laws." *Judulang* v. *Holder*, 132 S. Ct. 476, 490 (2011). The BIA has failed to do that.

Ordinarily, the "purposes and concerns of the immigration laws" place the interests of U.S. citizen-sponsors ahead of the interests of LPR-sponsors. Only citizens may petition for parents, married children, and siblings. *See* 8 U.S.C. §§1151(b)(2)(A)(i), 1153(a)(1), (3)-(4). And U.S. citizens may petition for spouses, unmarried minor children, and parents without regard to direct numerical limits, allowing immigration without substantial delay. *Id.* §1151(b)(2)(A)(i). The BIA's decision to treat derivative beneficiaries of citizen-filed petitions *less* favorably than derivative beneficiaries of LPR-filed petitions turns the typical "purposes and concerns of the immigrations laws" upside down. Moreover, in many cases, including Melvin Cuellar de Osorio's, Respondents' children are closely related to *two* LPRs (the principal beneficiary and her spouse), as well as a U.S. citizen grandparent, aunt, or uncle.

The BIA could not have grounded its decision in the "purposes and concerns" of the CSPA, *Judulang*,

132 S. Ct. at 490, if it ignored Congress's intent in passing the law, which was to "facilitate[] and hasten[] the reuniting of legal immigrants' families," 148 Cong. Rec. H4989, H4991 (July 22, 2002) (Rep. Sensenbrenner); *see supra* p.24 & n.7. Congress's manifest intent was to allow *all* derivative beneficiaries to immigrate close in time to their families—not just the small subset of derivative beneficiaries that the agency favors. *See supra* p.24 & n.7.[17] That is consistent with the immigration law's broader values, which include promoting family unity, *see, e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977) (recognizing immigration law's concern with "'preservation of the family unit'"), and inconsistent with the BIA's decision to give the majority of aged-out derivative beneficiaries no credit for their wait.

The BIA's primary justifications for its decision are simply erroneous. As the government acknowledges (Br. 50-51), the BIA asserted that its distinction is necessary to ensure "consisten[cy] with past practice in immigration statutes and regulations." But "the concept of 'retention' of priority dates" has *not*, contrary to the BIA's belief, "always been limited to" successive petitions filed by the same petitioner, *Wang*, 25 I. & N. Dec. at 35; *see supra* pp.44-45 (collecting examples).

As for automatic conversion, the BIA observed correctly that "the term 'conversion' has consistently been used to mean" that the beneficiary "falls within a

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[17] The government asserts that, had Congress wished to include *all* derivative beneficiaries, it could simply have frozen their ages as certain other provisions do. Br. 44. The government's argument is illogical. Congress's choice to provide a different form of relief—retention of priority date rather than age-freezing—says nothing about which derivative beneficiaries are eligible to receive it.

new classification without the need to file a new visa petition." 25 I. & N. Dec. at 35. But as discussed above, the BIA misread the statute to trigger automatic conversion "at the moment" a beneficiary ages out, which led the BIA mistakenly to conclude that "no category exists" into which a non-F2A derivative beneficiary's petition could be converted. *Id.* at 35, 36. Had the BIA instead heeded the statute's clear instruction that a petition is only converted after the "determin[ation] under paragraph [(h)](1)" that the alien's age is at least 21, it would have realized that the petitions of F3 and F4 derivatives *can* seamlessly "fall[] within a new classification"—the F2B category—"without the need to file a new visa petition." *See supra* pp.29-32. Consistency with past practice (as the BIA defined it) can thus be preserved without excluding *any* derivative beneficiaries.

Wang's second justification also is mistaken. Analyzing the CSPA's legislative history, the BIA concluded that Congress's *sole* purpose was "to alleviate the consequences of administrative delays." 25 I. & N. Dec. at 38. The BIA found "no indication ... that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line." *Id.* Even the government does not defend that manifestly incorrect proposition. The "consequences of administrative delays" are addressed by paragraph (h)(1), but paragraph (h)(3) provides relief from the very backlog delays the BIA claimed were irrelevant. Indeed, the BIA's own interpretation of paragraph (h)(3) grants F2A derivative beneficiaries relief when they age out due to visa backlogs, so its explanation cannot justify the line it drew.

The BIA thought it necessary to exclude citizen-sponsored derivatives to avoid "displac[ing] other aliens who have already been in [the F2B] line for years before" them. 25 I. & N. Dec. at 38. That is likewise incoherent, as the BIA allows *some* people to move into the F2B line from another line (F2A). The BIA's bare desire to limit the number of people who move into the F2B line cannot, by itself, justify the BIA's particular substantive limitation. *Judulang*, 132 S. Ct. at 490. The BIA has failed to tie its policy judgment to some other "purpose[] and concern[] of the immigration laws." *Id.*

In the interest of preserving family unity, Congress made the policy decision to allow aged-out derivative beneficiaries to retain their priority dates and move into the F2B line with credit for the time already spent waiting. But the judgment in this case will not result in Respondents' children receiving visas before anyone whose petition was filed earlier than theirs; it only means that they will receive credit for their family's long wait, as Congress directed, rather than resetting the clock to zero, as the BIA would. The government cites an idiosyncratic example from a student note (Br. 42), but the example actually illustrates how aged-out beneficiaries only ever receive visas ahead of those whose petitions have been pending for less time. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2235 (2012) ("Alice's son," who has been the subject of a petition since 1994, receives a visa before "Rose's daugh-

ter," who has only been waiting since, at the earliest, 2000).[18]

The BIA (and the government's brief) also "exaggerates" the impact of moving beneficiaries between visa lines. *Judulang*, 132 S. Ct. at 490. The government speculates (Br. 17) that affirming the Ninth Circuit would allow "likely tens of thousands of people" to advance their priority dates and "would substantially increase the wait times" for visas (*id.* 18). Those claims are untethered to any facts, as are the government's threats of "large number[s]" (*id.* 41) of beneficiaries "substantially disrupt[ing]" and "destabliz[ing] the immigrant-visa system" (*id.* 38) and causing "significant unfairness" (*id.* 41) by "increas[ing] the wait times for thousands and thousands of intending immigrants" (*id.* 49). Indeed, the government admits (*id.* 38-39) that it has no idea how many aged-out beneficiaries would benefit from paragraph (h)(3) in a given year under the decision below. While many aged-out derivatives would be able to retain earlier priority dates that have been denied them, that impact is entirely caused by the agency's failure to implement Congress's clear instructions for over a decade. That is not a reason to continue denying benefits to a group clearly covered by the statutory language. Moreover, the government has presumably complied with the Fifth Circuit's precedent in

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[18] The government also fashions two uncommon scenarios in an attempt to demonstrate the potential unfairness of the Ninth Circuit's holding. Br. 43 n.14 (suggesting that a stepchild should not get credit for the time her new parent waited in line and pointing out that siblings may be divided if one was already over 21 when the petition was filed). But the fact that *Congress* had to make difficult policy choices in crafting the statute does not justify the *BIA's* decision to draw a different, arbitrary line among derivative beneficiaries that Congress did *not* draw.

Khalid and made retention of priority date available to aged-out derivative beneficiaries in that circuit without any demonstrated hardship.

Even accepting the government's dubious assumption that thousands would enter the F2B line each year, the impact on individuals already in the F2B line would be far more limited than the government suggests. Approximately 26,250 aliens are admitted annually in the F2B category.[19] Each aged-out child who moves into that line therefore delays those with later priority dates by only approximately 2/100ths of a day.[20] Even if 5,000 aged-out derivatives moved into the F2B line at once, an individual in the F2B line would move back by under three months. This additional delay is of course unfortunate, but the contrast between the impact on those already in the F2B line and the far more significant impact on each of those 5,000 aged-out derivatives and their families is striking. Melvin Cuellar de Osorio would be saved approximately nine years of family separation, Ruth Uy approximately twenty-seven years. Congress was well within its rights to determine that the best choice under the circumstances was to save those people multiple years of anguish by allowing them to move into the F2B line and keep their priority dates.[21]

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[19] State Department, *Annual Report of Immigrant Visa Applications in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of Nov. 1, 2012*, at 6.

[20] The delay is longer for oversubscribed countries, but it is still less than a day.

[21] The government can hardly fault the Ninth Circuit for "not attempt[ing] to assess the significance of [its] result" (Br. 13); the

Additionally, the "expectations" of aliens waiting in a visa line are far less "settled" than the government represents (Br. 44). Movement between preference lines is a regular feature of the immigration system, not some anomaly introduced by the judgment below. *See, e.g.*, 8 U.S.C. §1154(k); 8 C.F.R. §§204.2(i), 204.5(e). The membership of each preference line also fluctuates constantly. New derivative beneficiaries enter each line as principal beneficiaries get married and give birth or adopt. Other aliens leave the lines as petitioners die or lose LPR status and as principal beneficiaries divorce or become widowed. And each preference category influences the others: If some allotted F3 visas are unclaimed, they can be taken by F4 beneficiaries. *See* 8 U.S.C. §1153(a)(4). Cut-off dates thus regularly leap forward or retrogress. The State Department warns that visa availability dates "cannot be predicted for individual cases with any accuracy." State Department, *Family-based Immigrant Visas*.[22]

The line the BIA drew between F2A derivative beneficiaries and all others cannot be justified in "the purposes and concerns of the immigration laws,"

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government failed to provide that court (or this Court) with any data or facts from which to make such an assessment.

[22] *See, e.g.*, State Department, *Visa Bulletin for Sept. 2013* (Aug. 12, 2013) ("[A] sudden surge in demand could require the retrogression of a cut-off date at any time."); State Department, *Worldwide Cut-off Dates* (noting that, in 2002, "[i]t was necessary to retrogress the F1 cut-off date in an attempt to hold issuances within the annual numerical limit"). The State Department even facilitates changes to cut-off dates for policy reasons. *Visa Bulletin for Sept. 2013* ("F2A: This category was made 'Current' in an effort to generate new demand for the upcoming fiscal year.").

Judulang, 132 S. Ct. at 490; it is based on mistaken premises, faulty logic, and unsound analysis, and deserves no deference. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (conditioning deference on "the thoroughness, validity, and consistency of an agency's reasoning").

B. The Government Cannot Salvage *Wang* Through Post Hoc Policy Rationales First Offered In Court

The government's attempt to salvage *Wang* through a parade of policy arguments never adopted by the BIA fares no better. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."); *see also Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Moreover, government's post hoc litigation arguments suffer from a fundamental flaw: they equally disfavor granting paragraph (h)(3) relief to F2A derivatives, whom the government concedes *can* receive such relief. While it is true that "former derivative beneficiaries might continue to surface" because "[a] person claiming derivative-beneficiary status as a 'child' need not have actually been named" in the original petition (Br. 28 n.8, 41, 43), that is also true of children of principal beneficiaries in the F2A category. F2A derivative beneficiaries who are allowed to retain their original priority dates will also "almost always vault ahead of other aliens already waiting in the F2B line." *Id.* 40. The government bemoans "giving former derivative beneficiaries 'credit for the years' in which they qualified as a 'child'—a period during which they and their parents were not separated from each other" (*id.* 43 (ci-

tation omitted))—yet it happily gives F2A derivative beneficiaries that very credit. The government asserts that Section 1153(d) is designed "to ensure that at the moment the parent comes to this country" she "need not leave behind a child under the age of 21, who cannot be expected to live independently" (*id.* 42-43), but aged-out F2A derivative beneficiaries are no different from aged-out F3 and F4 beneficiaries in this regard. Summarizing its complaints, the government protests (*id.* 44) that the Ninth Circuit's interpretation would supposedly "reshuffle the statutorily prescribed waiting lines, disrupt the settled expectations of a large number of intending immigrants ..., introduce unwarranted tensions among the categories of aliens, ... and undermine the perception of fairness." Yet *all* of these consequences—to the extent they arise at all—arise when F2A beneficiaries age out and retain their priority dates in the F2B line, which the government concedes is permissible. The government's policy arguments accordingly do not support discriminating between F2A derivative beneficiaries and Respondents' children.

The reality appears to be that the government, for its own unfathomable reasons, disapproves of Congress's decision to allow *any* aged-out derivative beneficiaries to retain their priority dates when they move into the F2B category. Although it cannot argue that paragraph (h)(3) provides no relief to anyone, it argues the next worst thing: that it should be limited to as few derivative beneficiaries as possible.

The Court should not allow the government to circumvent the statute and certainly not in such an arbitrary and unjustifiable way. Congress made a clear choice to allow *all* derivative beneficiaries to retain their priority date after aging out. The government

should implement the statute as written, whether or not it agrees with it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2013

REPLY BRIEF

No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONERS

The BIA's reasonable interpretation of 8 U.S.C. 1153(h) is entitled to *Chevron* deference. That provision makes "automatic[]" conversion of an existing petition "to the appropriate category" a prerequisite for the special protection it affords. But for aged-out former derivative beneficiaries of F3 and F4 petitions, no such category exists for automatic conversion. Although the parent of such an aged-out person might eventually become a lawful permanent resident (LPR) and be entitled to file an F2B petition naming the aged-out person as a principal beneficiary, reliance on a brand-new petition filed by a brand-new petitioner is outside the scope of the statutory language. In addition, such an aged-out person's parent cannot have attained LPR status at the moment when the new category must be "appropriate": the date when a visa

number becomes available to the parent. The BIA therefore sensibly read Section 1153(h)(3) to extend only to aged-out beneficiaries of F2A petitions, who either were or could have been *principal* beneficiaries in their own right in the first instance, and for whom an "appropriate" category is "automatically" available without a new petition and change in the petitioner. That reading—which interprets the provision to essentially codify a preexisting regulation—avoids the disruption and conflict in the immigrant-visa system that respondents' sweeping new rule would create.

A. The Board's Interpretation Of The Automatic-Conversion Language In Section 1153(h)(3) Is Reasonable

To justify their contention that Section 1153(h)(3) unambiguously forecloses the BIA's interpretation, respondents assert that one of the provision's operative clauses—that "the alien's petition shall automatically be converted to the appropriate category"—is actually irrelevant to a proper understanding of that provision. They also advance a timing argument never previously made in this case and never mentioned by a single court to have addressed Section 1153(h)(3). Those arguments suffer from numerous flaws.

1. As an initial matter, respondents attempt (*e.g.*, Br. 25) to avoid the automatic-conversion language entirely by arguing that Section 1153(h)(3) unambiguously covers all of the derivative beneficiaries that Section 1153(h)(1) covers. That argument lacks merit.

First, neither Section 1153(h)(3)'s cross-reference to Section 1153(h)(1) (see Gov't Br. 32-33) nor the use of the phrase "purposes of subsections (a)(2)(A) and (d)" in each signifies that both sections have the same scope. Resp. Br. 18-21. In Section 1153(h)(3), the

"purposes" phrase is used in the course of referring back to the age calculation set forth in Section 1153(h)(1)—and that age calculation is indisputably *one* of the things that is necessary to obtain relief under Section 1153(h)(3). But the existence of that condition does not negate the reasonableness of the Board's conclusion that Section 1153(h)(3) contains an additional condition: that there must be an "appropriate" statutory category to which a petition can "automatically be converted." Some aliens covered by Subsection (a)(2)(A) (F2A) and Subsection (d) (derivative beneficiaries) satisfy that additional condition, and some—like respondents' sons and daughters—do not.[1]

Second, a comparison with the regulation that Section 1153(h)(3) modestly expanded (Resp. Br. 22-23) does not aid respondents. While the regulation specified that an F2A derivative beneficiary could retain a priority date when a subsequent petition was "filed by the same petitioner," 8 C.F.R. 204.2(a)(4), it would have been superfluous to repeat that language in Section 1153(h)(3) in light of the requirement of automatic conversion, which is not contained in the regulation. See Gov't Br. 46 n.15.

Third, the legislative history (Resp. Br. 24) does not support respondents. They suggest that their

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[1] The heading of the relevant CSPA section (Resp. Br. 23-24) adds nothing to the analysis. The BIA's interpretation does not render meaningless any part of the heading, which is relevant only in case of an ambiguity in any event. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). The heading applies to the whole of Section 1153(h), not just to Section 1153(h)(3), see 116 Stat. 928, and employment-based immigrants benefit from Section 1153(h)(1) under any party's reading.

reading fits within a purpose to protect a child whose "*application* for a * * * visa was submitted before the child" turned 21. 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (emphasis added), quoted in Br. 24. But a visa *application* is submitted only after a visa number becomes available, and the protection referred to is found in Section 1153(h)(1), which addresses administrative delays in adjudicating such applications, not in Section 1153(h)(3). See Gov't Br. 5-6. Respondents also imply (Br. 24 n.7) that the House sponsor recognized a "broaden[ing]" of Section 1153(h)(3) to address delays caused by annual visa limits, but the cited statement refers solely to modifications that "provide[d] relief * * * when the INS takes too long to process * * * adjustment of status applications." 148 Cong. Rec. H4992 (daily ed. July 22, 2002); see Gov't Br. 49 n.16. And respondents ignore repeated floor statements that the CSPA was not intended to displace aliens already waiting in visa lines, see, *e.g.*, *id.* at 49—exactly the disruption respondents' reading would create, see pp. 17-20, *infra*. Read in full, the legislative history gives no indication that Congress intended Section 1153(h)(3) to work as respondents posit. See *Matter of Wang*, 25 I. & N. Dec. 28, 36-38 & n.10 (B.I.A. 2009).

Fourth, respondents err in relying (Br. 25-26) on a handful of lower-level or non-precedential pre-*Wang* adjudications. Allowing aliens to resurrect defunct priority dates is not literally impossible. See Gov't Br. 36 n.12. But *Wang* reasonably interpreted Section 1153(h)(3) to confer a more limited benefit, and earlier non-authoritative decisions reaching a different conclusion do not undermine *Wang*'s fully reasoned anal-

ysis. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007).[2]

2. Respondents next attempt (Br. 28-38) to show that aged-out former beneficiaries of F3 and F4 petitions unambiguously fall within the scope of Section 1153(h)(3)'s automatic-conversion language. In respondents' view, Section 1153(h)(3) functions like this: if, at the moment an aged-out former derivative beneficiary's visa or adjustment-of-status application is adjudicated, the aged-out person's parent (the principal beneficiary of the petition as to which the aged-out person was once a derivative) has become an LPR, the F2B category is "appropriate" and automatic conversion is available. That argument depends on the premise that an F3 or F4 petition filed by one person can automatically be converted into an F2B petition filed by an entirely different person—even where the only possible F2B petitioner has never actually submitted a petition or otherwise formally sought to sponsor the family member.

Respondents' premise is fundamentally flawed. It does not comport with the plain language of Section 1153(h)(3), which contemplates that the existing petition will "convert[] to the appropriate category," not become an entirely new petition with a brand-new petitioner and a brand-new principal beneficiary. Nor can it be reconciled with Section 1154, which provides that an LPR seeking classification of a family member should "file a petition." 8 U.S.C. 1154(a)(1)(B). It also cannot be reconciled with related requirements that a

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[2] Respondents cite the *Garcia* decision (*e.g.*, Br. 13, 25, 44 n.15) without noting that it is non-precedential and not binding with respect to non-parties. See *Wang*, 25 I. & N. Dec. at 33 n.7; 8 C.F.R. 103.3(c); *BIA Practice Manual*, Chap. 1.4(d)(ii) (2013).

petitioner must satisfy either when a petition is filed and approved, see, *e.g.*, 8 U.S.C. 1154(a)(1)(B)(i) (providing that LPR may not file petition if she "has been convicted of a specified offense against a minor"), or at some later point, see, *e.g.*, 8 U.S.C. 1182(a)(4)(C) (requiring that petitioner file affidavit promising financial support, except as to petitions benefiting abused persons, widows, or widowers).[3]

Respondents' defense largely depends on ignoring the prerequisite that the petition be converted "to the appropriate category." That language dictates that the existing petition move into a new category where it fits, because the relationship on which the petition is based remains the same. See 8 U.S.C. 1153(h)(3).

Respondents assert (Br. 34-36) that the BIA's reading of Section 1153(h)(3) requires just as great a change to "the alien's petition" as theirs does. That is wrong. When an F2A petition as to which a former child has aged out is automatically converted to an F2B petition, the petitioner remains the same, and the family relationship between the petitioner and the aged-out person—a parent/child relationship—remains the same. If aged-out former derivative beneficiaries of F3 and F4 petitions were also covered, then the identity of the petitioner would change entirely (from the aged-out person's grandparent, aunt, or uncle to the person's parent), as would the relationship between the petitioner and the beneficiary. Con-

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[3] Respondents themselves filed, or are the subjects of, new F2B petitions. See Gov't Br. 9-10. Nevertheless, parting ways from the en banc court of appeals (Pet. App. 18a, 20a), respondents appear to agree (*e.g.*, Br. 31 n.8) that aged-out former derivative beneficiaries do not qualify for automatic conversion if a new F2B petition must be filed to make the F2B category "appropriate."

trary to respondents' contention, that is a "radical change" (Br. 34); it cannot be characterized as mere automatic conversion of an existing petition "to the appropriate category."

Finally, respondents ignore the fact that every use of "converted" in the CSPA, as well as in the regulations in place when that law was enacted, supports the BIA's understanding of the word as excluding a petition requiring a brand-new petitioner. Respondents argue (Br. 36-37) for a far broader interpretation by pointing to a handful of provisions involving one unique circumstance: a self-petition, in which an abused person or widow can prosecute her own petition because the U.S. citizen or LPR with whom she has a qualifying relationship is an abuser or has died. But those narrow examples do not support respondents' sweeping rule. Family-preference self-petitions are *sui generis* and do not require consideration of a new relationship, with a different person, in order to identify a new "appropriate" visa category for a beneficiary. For instance, 8 C.F.R. 204.2(i)(1)(iv)—one of the two provisions to which respondents point—did not go into effect until years after the CSPA, 71 Fed. Reg. 35,732, 35,749 (June 21, 2006); see *Wang*, 25 I. & N. Dec. at 34 (focusing on regulations in effect "at the time Congress enacted the CSPA"), and addresses a situation in which a self-petition by a widow is based on the exact same spousal relationship with a U.S. citizen as the petition the citizen previously filed. Thus, the citizen effectively continues to play a notional "petitioner" role in this context.

Indeed, respondents' primary self-petitioner example undermines their position. Section 1154(a)(1)(D)(i)(III), which preexisted the CSPA,

gives the aged-out derivative beneficiary of an abused self-petitioner the ability to become a self-petitioner in his own right without "requir[ing]" the filing of a "new petition." 8 U.S.C. 1154(a)(1)(D)(i)(III) (providing that benefit without using any variant of "converted"). The CSPA referenced that provision, stating in Section 7 that "[n]othing in the amendments made by the [CSPA] shall be construed to limit or deny any right or benefit provided under" Section 1154(a)(1)(D)(i)(III). CSPA § 7, 116 Stat. 930. That reference evinces a recognition that Section 1153(h)(3) is reasonably read to forbid moving an existing petition to a category that would be available only if a new petitioner stepped in; if the CSPA were unambiguously broad enough to permit such a change, Congress would have had no basis for concern that the CSPA would "limit" rights under Section 1154(a)(1)(D)(i)(III).[4]

3. Because the prerequisite that the alien's petition "automatically be converted to the appropriate category" does not encompass the metamorphosis of an F3 or F4 petition by one person into an F2B petition by another person, respondents' further argument concerning the timing of determinations under Section

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[4] Section 1153(h)(4)—enacted several years after the CSPA—does not suggest otherwise. See Pub. L. No. 109-162, § 805(b)(2), 119 Stat. 2960 ("Paragraphs (1) through (3) [of Section 1153(h)] shall apply to self-petitioners and derivatives of self-petitioners"). The age-related protection in Section 1154(a)(1)(D)(i)(III) does not operate through the medium of Section 1153(h); it operates independently. Section 1153(h)(4) therefore does not "necessarily envision[] conversions with a change in petitioner" (Resp. Br. 36). And even if it did, that would suggest that Congress decided to enact that provision precisely because Section 1153(h)(3), standing alone, would not apply where a new petitioner was required.

1153(h) is irrelevant. In any event, that argument—which attempts to place the moment for ascertaining the existence of an "appropriate category" in or even beyond the final stages of the immigrant-visa process—suffers from numerous difficulties.

The statute is most naturally read to set out expressly the moment at which an "appropriate category" must exist in order for automatic conversion to benefit an aged-out derivative beneficiary who has undergone the Section 1153(h)(1) calculation: "the date on which an immigrant visa number became available for the alien's parent." 8 U.S.C. 1153(h)(1)(A); see 8 U.S.C. 1153(h)(3) (referring to "paragraph (1)" determination).[5] See Pet. App. 21a n.4 (en banc majority). That is the moment when the derivative beneficiary is either under 21 pursuant to the calculation (and therefore continues to qualify as a child for the rest of the visa process) or over 21 pursuant to the calculation (rendering automatic conversion proper if such conversion is possible, see Gov't Br. 24-26).[6] It is also a moment when the principal-beneficiary parent of an aged-out F3 or F4 derivative beneficiary cannot have already attained LPR status, because that would require an additional application,

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[5] Whether and how to apply Section 1153(h)(3) if the aged-out alien does not meet the Section 1153(h)(1) requirement to seek "to acquire the status of an alien lawfully admitted for permanent residence" within one year of the visa number becoming available to his parent, 8 U.S.C. 1153(h)(1)(A), is another potential area of ambiguity—one *Wang* specifically reserved, see 25 I. & N. Dec. at 32-33.

[6] Respondents suggest (*e.g.*, Br. 28-29, 32) that the BIA ruled, and the government argues, that automatic conversion must be "appropriate" when the alien passes the biological age of 21. That is incorrect. *Wang*, 25 I. & N. Dec. at 35-36; Gov't Br. 26.

additional approval, and—for aliens outside the United States—admission at the border. See *id.* at 26.

Respondents ignore the statutory language in favor of a later "trigger" found nowhere in the provision's text: the date when an aged-out person's adjustment-of-status application is adjudicated or he is interviewed by a consular officer. Indeed, respondents suggest that the adjudication or interview is merely the "*earliest*" possible time for automatic conversion, and someone whose visa application is denied at an interview can simply come back to try again. Br. 29-30. In short, respondents' timing argument is designed to push the assessment of whether an "appropriate category" for automatic conversion exists as late as possible, in the hope that the aged-out person's parent will eventually become an LPR and the F2B category might then be deemed "appropriate." 8 U.S.C. 1153(h)(3).

None of respondents' asserted justifications for such a delayed trigger is sound. First, respondents point (Br. 29) to the fact that Section 1153(h)(3) opens with the phrase "[i]f the age of the alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(h)(1) (referring to "a determination of whether an alien satisfies the age requirement"). But that language does not state that whether automatic conversion is "appropriate" is to be examined as of the date when an immigration official ultimately performs the calculation. The statute says "[i]f," not "when," and it is worded passively. Moreover, the conversion is to be "automatic"—without intervention of a third party. Those textual features support the conclusion that the key point in time is the date when the purported derivative benefi-

ciary exceeded 21 years of age pursuant to *operation of the statute*—that is, the "date on which an immigrant visa number became available for the alien's parent," 8 U.S.C. 1153(h)(1)(A)—and not when a retrospective calculation happens to be carried out.[7] See *Wang*, 25 I. & N. Dec. at 35.

That conclusion is further bolstered by the fact that other automatic-conversion provisions—including the regulations on which Congress drew when it enacted the CSPA, see Gov't Br. 29-30—function in just that way. Employing an "automatic[]" process, conversion occurs under those provisions as of the date when an existing category stopped being appropriate and a new one became appropriate, not as of the date when an agency official happened to be notified of the marriage, naturalization, or other event that prompted the category change. See 8 C.F.R. 204.2(i).[8]

Second, respondents' argument depends on agency practices not commanded by any statute or regulation. See Br. 29 (citing manuals). Even assuming that an immigration official's performance of the calculation could dictate the moment when a new "appropriate"

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[7] To be sure, whether an alien qualifies under Section 1153(h)(1) for "using" his "age * * * on the date" of a parent's visa-number availability depends on whether "the alien has sought to acquire" LPR status "within one year of such availability." 8 U.S.C. 1153(h)(1). But that condition subsequent is fully consistent with the requirement that "the alien's petition" is to be "automatically * * * converted to the appropriate category" (if any) *as of* the qualifying date of visa-number availability.

[8] That is not because "automatically" has the inherent meaning of "immediately." Resp. Br. 33; see Gov't Br. 22-23. As respondents at times accept (Br. 33-34), when an action is to take place "automatically" as of the occurrence of a particular event, there is no room for additional delay or outside input.

category must be available, the official could undertake an age calculation as soon as the aged-out alien seeks to "acquire * * * status," 8 U.S.C. 1153(h)(1)(A))—something that includes the filing of adjustment-of-status or immigrant-visa application papers, as well as certain actions that fall short of such a formal request. See *Matter of Vazquez*, 25 I. & N. Dec. 817 (B.I.A. 2012). Nothing prevents the agencies from assessing age under Section 1153(h)(1) at that time, in which case (under respondents' approach) the trigger point would be long before any ruling on an application. See, *e.g.*, 8 C.F.R. 245.2(a)(2)(i)(A) and (B).[9]

In any event, even the delayed trigger that respondents envision does not guarantee that the aged-out derivative beneficiary's parent will have attained LPR status at the relevant moment. If a principal-beneficiary parent and her aged-out son have a consular interview together, the parent will not be an LPR on that date, regardless of whether her visa application is approved at the interview. See 8 U.S.C. 1154(e), 1201(h); USCIS, *Consular Processing*, http://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing. And even if the aged-out son is interviewed on a date subsequent to the parent's interview, the parent still may not have become an LPR at that time (for example, because she has not been admitted at a U.S. port of entry). Whether a parent *ultimately* gained LPR status would not change the fact that the aged-out person was over 21, and had no "appropriate category" avail-

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[9] While a visa applicant could conceivably ask that a consular officer revisit such a calculation, see 22 C.F.R. 42.62, a calculation would nevertheless already have taken place.

able, when the very "determination" to which respondents point was made. Respondents labor (Br. 30) to show that if conditions were just right, and various special steps were taken, an aged-out person's interview could possibly be delayed until after the parent becomes an LPR. But the very need for such elaborate choreography is hardly consistent with the concept of "automatic[]" conversion, something that in every other context happens without special intervention. See, *e.g.*, 8 C.F.R. 204.2(i).

B. Section 1153(h)(3) Does Not Permit Retention Of A Priority Date Independent Of Automatic Conversion

Respondents' fallback argument is that priority-date retention is available under Section 1153(h)(3) even when automatic conversion is not. That is not the most natural reading of the provision, and certainly it is not compelled.[10]

Respondents primarily rely (Br. 39-40) on an invented example intended to show that when two instructions are separated by "and," the second one should be fulfilled even if the first one cannot be. But such abstractions are of no help in interpreting Section 1153(h)(3). It is simple to construct counter-examples in which the final instruction in a sentence is

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[10] Contrary to respondents' assertion (Br. 38 n.12), *Wang* does indicate that conversion and priority-date retention must go hand-in-hand. The only relief requested in *Wang* was retention, but the Board described the issue as whether an aged-out derivative beneficiary "may automatically convert her status to that of a beneficiary of a second-preference category." *Wang*, 25 I. & N. Dec. at 30; see *id.* at 33-34, 36; Pet. App. 56a (panel op.) ("[t]he BIA also concluded that priority date retention could *not* operate separately from automatic conversion"); Am. Immigr. Council C.A. Amicus Br. 14-15.

conditional on carrying out a prior instruction—for example, "if you get a perfect score, then you shall apply for the Smith scholarship and you shall answer the committee's questions about your submission." Whether "and" is being used to suggest that one idea is sequential to or conditional on another is, like many questions of usage, dependent on context. See, *e.g.*, *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1681-1682 (2012).

Here, the context of Section 1153(h)(3) shows that automatic conversion is a prerequisite. The upshot of respondents' position would be to create a free-floating priority date, untethered to any existing petition, that could be used at any time in the future in connection with any petition filed by anyone. On respondents' view, for instance, an aged-out former F3 derivative beneficiary—someone who was once, however briefly, under age 21 while his parent was awaiting an F3 visa number—could use the priority date of the F3 petition many years later in connection with a petition newly filed on his behalf by his sister or brother. Section 1153(h)(3) cannot be read in that improbable way, especially in light of the historical meaning of "retain" and "retention" in immigration law. See *Wang*, 25 I. & N. Dec. at 35-36. That conclusion is confirmed by a comparison with other automatic-conversion provisions, which are similarly written to clarify that conversion does not wipe out the petition's existing priority date. See Gov't Br. 35 n.11.

The "textual features" to which respondents point (Br. 40-42) do not suggest otherwise. In stating that a converted petition "shall retain the original priority date issued upon receipt of the original petition," Section 1153(h)(3) does not suggest the existence of

multiple filings; it merely refers in a commonsense way to the date when the single petition at issue was first ("original[ly]") filed. And the fact that it is the "alien" who retains the priority date (while "the alien's petition" is automatically converted) underscores that Congress envisioned retention only in connection with automatic conversion of the petition. A priority date is a filing date, nothing more or less. It is natural to refer to a priority date in shorthand terms as belonging to the alien who is the beneficiary of the petition filed on that date (*id.* at 41), but that does not suggest that an alien can somehow own or hold a priority date, like a token, separate from any existing valid petition. In Section 1153(h)(3), Congress specified which petition a retained priority date attaches to—an automatically converted petition, not a new, later-filed one.

Respondents' arguments about practices in other contexts—almost none of which involve the terms of art "retain" or "retention"—are also unconvincing. There are provisions that speak of a priority date as a benefit distinct from conversion of a petition. But they do so clearly, in carefully cabined language making reference to the petition that will bear that priority date, and in limited circumstances that do not indefinitely apply across all family-preference and employment-based categories. For example, Section 6 of the CSPA (8 U.S.C. 1154(k)) permits an alien waiting in the F2B line whose parent naturalizes to "maintain" a priority date in the absence of conversion—and it explains how in that circumstance the priority date continues to attach to an operative petition, rather than remaining available for perpetual re-usage, see, *e.g.*, 8 U.S.C. 1154(k)(2)-(3); see also *Li* v. *Renaud*, 654 F.3d 376, 383 (2d Cir. 2011). The comparison of that

CSPA language to Section 1153(h)(3) shows that no similar "decoupl[ing]" (Resp. Br. 42) was intended here. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[11]

Finally, respondents' contention that their sons and daughters would be entitled to retention even with respect to a new petition filed by a different petitioner is incorrect. Respondents misportray (Br. 44) the government's brief, which (like *Wang*) correctly states that use of "retention" in "family-preference" circumstances has always been limited to a successive petition filed by the same petitioner. Gov't Br. 37 (citing *Wang*, 25 I. & N. Dec. at 35). Respondents (Br. 45) do not identify any family-preference-related provision using the terms "retain" or "retention" providing otherwise. Indeed, only one of their examples uses those terms in its text: it is a specialized regulation in the employment-based context governing successive petitions filed by interchangeable employers that both have the same relationship with a physician seeking to work in an underserved area. See 8 C.F.R. 204.12(f)(1) (requiring that first petition remain valid); see also 8 C.F.R. 204.5(e) (referring to "[r]etention" in heading and "accord[ing]" priority date to new em-

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[11] The government's "implementation of paragraph (h)(3)" (Resp. Br. 42-43) does not support respondents' position. As the petition explained, Pet. 22 & n.5, implementation has not always been consistent. But the government recently issued formal guidance making clear that aged-out F2A derivative beneficiaries are entitled to automatic conversion pursuant to Section 1153(h)(3), without a new petition. See USCIS Policy Memorandum No. PM-602-0094 (Nov. 21, 2013). Moreover, the regulation addressing aged-out F2A derivatives in place when the CSPA was enacted (8 C.F.R. 204.2(a)(4)) did not allow the open-ended retention that respondents seek, as *Wang* emphasized. *Wang*, 25 I. & N. Dec at 34-36.

ployment petition filed while earlier one remains valid).

C. The Board's Interpretation Is Most Consistent With The Statutory Immigrant-Visa Framework

1. Respondents characterize the destabilizing effect of their interpretation as presenting merely an issue of "policy" (Br. 46). But it is fundamentally an issue of statutory interpretation. The variety of statutory restrictions and requirements that make up the complex immigrant-visa system constitute the context in which Section 1153(h)(3) must be integrated and assessed. See Gov't Br. 38.[12]

No one can say with complete certainty how many aged-out former derivatives—from both the family-sponsored and employment-based categories—would pour into (and advance to the front of) the F2B line under respondents' expansive interpretation, since derivative beneficiaries need not be listed on a petition and since some aged-out former derivative beneficiaries may have died, immigrated to the United States through other means, or lost interest in immigrating. The government's statement that the number "could be in the tens of thousands, or even higher" (Gov't Br. 38) was therefore deliberately conservative.[13] The consequence of such an influx into the F2B

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[12] Respondents incorrectly assume (*e.g.*, Br. 44 n.15) that their approach has been implemented in the Fifth Circuit. When *Khalid* was decided, the government had prevailed on the Section 1153(h)(3) issue in a nationwide class action. Pet. App. 79a-84a. When the en banc Ninth Circuit overruled the panel decision affirming that judgment, the mandate was stayed, and the government sought certiorari.

[13] For instance, data furnished by the State Department show the following numbers of aged-out family-preference derivative

line—which admits only a total of approximately 26,250 people per year, with an annual per-country limit of approximately 1,838 people, see 8 U.S.C. 1152(a)(2), 1153; *Annual Report of Immigrant Visa Applicants in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2012*, at 6 (*Annual Report*)—would be stark. Because aged-out former F3 and F4 derivatives from every country except Mexico would jump to the front of the line (and other former beneficiaries would be inserted at various spots), those currently waiting for an F2B visa to become available—hundreds of thousands of people, see Gov't Br. 40-41—could in many cases face additional delays of years.

Respondents challenge (Br. 51-52) the government's estimate. But the impossibility of deriving a precise figure is hardly reason to assume no impact at all. After all, on respondents' view, derivative beneficiaries who age out apparently could revive old priori-

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applicants for fiscal years 2004 through 2013 (the first number in each parenthetical represents aged-out derivatives in the F2A category, and the second number represents aged-out derivatives in all family-preference categories including F2A): 2004 (5645; 18,234); 2005 (4634; 20,985); 2006 (2124; 22,051); 2007 (15,652; 33,794); 2008 (4494; 22,302); 2009 (5524; 29,578); 2010 (9178; 111,683); 2011 (2841; 27,438); 2012 (2750; 8065); 2013 (1497; 12,987). Some of these aged-out persons sought to acquire status within one year of the date a visa number became available for a parent and some did not. These numbers do not include aged-out derivatives in any employment-based category or aged-out derivatives whose applications were processed by USCIS (which does not keep comparable records). Not all aged-out former derivatives would seek to join or change places in the F2B line if respondents' interpretation were adopted, but the number who would is likely in the tens of thousands or higher.

ty dates whenever they like, now or in the future. See, *e.g.*, Br. 45.[14] Even when the CSPA was enacted, the influx would have been disruptive; at that time, too, there were large numbers of aged-out former derivative beneficiaries who could make some claim in relation to petitions filed long ago, and new aged-out persons constantly surfacing as their parents' visa numbers became available. See 8 U.S.C. 1151 note (CSPA effective date).

Respondents are also wrong (Br. 50) about the equities. In respondents' view, an aged-out former derivative beneficiary of an F3 or F4 petition should receive a visa quickly via the F2B line when her parent becomes an LPR, without any meaningful period of separation. But unlike an aged-out derivative beneficiary of an F2A petition, such an aged-out person previously had no relationship with *any* citizen or LPR that would qualify her for family-sponsored immigration. Indeed, she might not yet have been born, or qualified as a derivative, for part or even most of the time her principal-beneficiary parent spent in the F3 or F4 line. Still, respondents would have her displace many thousands of people waiting in the F2B line, even though those people have had a qualifying relationship for as long as their F2B petitions have been pending and have likely been separat-

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[14] Respondents' figure of 5,000 aged-out former derivative beneficiaries (Br. 52) is hypothetical. And respondents' calculation of the delay associated with inserting 5,000 people at the front of the F2B line is far too rosy. If, for instance, 1,900 of those people were from the Philippines due to historical immigration patterns, then everyone waiting in that line from that country—currently at least 50,000 people, see *Annual Report* 3—would be delayed by at least a full year.

ed from their parents for that entire time. There is nothing "idiosyncratic" about that situation (*ibid.*); it is the inevitable result of respondents' position.[15]

Respondents insist (Br. 54-55) that all of the consequences that attend their reading of the statute also attend the BIA's reading. That, too, is incorrect. Gov't Br. 45-47. The BIA has reasonably interpreted Section 1153(h)(3) to grant special treatment to aliens who either always were or always qualified as principal beneficiaries and therefore could readily be found by Congress to deserve some credit for their wait—even as they move from a higher priority category to a lower one (the opposite of what respondents urge for aged-out former derivative beneficiaries of F3 and F4 petitions). The BIA's interpretation also inserts far fewer people into the F2B line to displace others waiting, and does not insert them at the front of the F2B line, since the cut-off dates in the F2A category are more recent than those in the F2B category. See, *e.g.*, U.S. Dep't of State, *Visa Bulletin* 2 (Dec. 2013). And because under the BIA's reading Section 1153(h)(3) essentially codified (while expanding modestly) the scope of a preexisting regulation (see Gov't Br. 45-46), there was no reason for Congress to believe that substantial disruption would ensue—as indeed it has not.

2. Respondents' remaining objections to the BIA's interpretation (see Br. 48-49) largely repeat their

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[15] The wait faced by an aged-out former derivative beneficiary of an F3 or F4 petition depends on the country to which that beneficiary is "chargeable" and when a new F2B petition is filed (if at all). For instance, the F2B petition for Melvin Osorio Cuellar—filed later than it could have been—is likely about a year away from becoming current. Resp. Br. 10; U.S. Dep't of State, *Visa Bulletin* 2 (Dec. 2013).

other flawed arguments. As an initial matter, respondents' suggestion (Br. 47) that the BIA's interpretation inappropriately favors relatives of LPRs over relatives of U.S. citizens has no basis. The relationship between respondents' adult offspring and U.S. citizens is in every case one that Congress has decided *not to recognize* as a basis for immigration to this country: the relationship between a grandchild and grandparent, or between a niece and an aunt. Respondents' contention that such a relationship should confer on them an entitlement to special priority status under Section 1153(h)(3) is therefore contrary to basic statutory premises of the visa program. Moreover, in the very statutory provision setting forth the family-preference categories, Congress prioritized the children and unmarried adult sons or daughters of LPRs (the F2A and F2B categories) over the married sons or daughters and the siblings of U.S. citizens (the F3 and F4 categories). 8 U.S.C. 1153(a). The BIA's interpretation of Section 1153(h)(3) is consistent with that order of priority, because it affords protection to persons who had, during the pendency of the "alien's petition," 8 U.S.C. 1153(h)(3), a relationship to an LPR that qualified them to be a principal beneficiary in an F2 category.

A general congressional purpose of facilitating "family unity" (Resp. Br. 48) says nothing about the scope of Section 1153(h)(3) or the reasonableness of *Wang*. The immigration laws do not "pursue" the "goal[]" of family unity "to the *n*th degree." *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).[16]

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[16] Indeed, were it Congress's goal to "allow *all* derivative beneficiaries to immigrate close in time to their families" (Resp. Br. 48), the multi-part structure of Section 1153(h) would be a "surpassing-

Congress has drawn lines, and the Board has reasonably construed those lines in light of the text, structure, and purposes of Section 1153(h) and the broader immigration framework of which it is a part. Section 1153(h)(3) cannot sensibly be read in the far different way that respondents urge, which departs from the text, structure, and purposes in a number of respects, just because "that rule would be family-friendly." *Ibid.*

In short, Section 1153(h)(3) readily admits of a reasonable reading that benefits certain aged-out persons —consistent with a preexisting regulation that Congress codified in various CSPA sections, Gov't Br. 31—but avoids disruption and conflict within the immigrant-visa system. The BIA's decision to adopt that reasonable reading, and to find aged-out former derivative beneficiaries of F3 and F4 petitions ineligible for "special preference immigration status" at the expense of other families, *Fiallo* v. *Bell*, 430 U.S. 787, 788, 791-793 (1977), is entitled to the deference that is "especially appropriate" in this context. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

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ly strange" way to proceed, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2072 (2012); if all those who age out could nevertheless immigrate in short order under Section 1153(h)(3), preserving child status (in Section 1153(h)(1)) would be of little significance.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 2013

AMICUS CURIAE BRIEF

No. 12-930

IN THE

Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.,
Petitioners.

v.

ROSALINA CUELLAR DE OSORIO, ET AL.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CATHOLIC LEGAL IMMIGRATION NETWORK INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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NOVEMBER 4, 2013

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STATEMENT OF INTEREST[1]

The Catholic Legal Immigration Network, Inc. ("CLINIC") is a nonprofit organization established by the United States Conference of Catholic Bishops to advocate on behalf of immigrants and to support a network of faith-based and community-based immigration programs. CLINIC's members include more than 240 diocesan and other immigration programs with 390 field offices in 46 states. The network employs approximately 1,200 attorneys and accredited paralegals and assists some 600,000 clients, parishioners, and community members with immigration matters annually. CLINIC is particularly concerned and involved with family-based immigration matters, and publishes books and provides training on this issue to attorneys and paralegals throughout the United States. Promoting family unity, one of the tenets of the Catholic Church's teachings and works, is one of CLINIC's goals.

The Child Status Protection Act ("CSPA") was designed to preserve family unity by protecting children against the vagaries of the visa backlog and preference system. The Board of Immigration Appeals (BIA) has eviscerated that purpose through its erroneous interpretation of 8 U.S.C. § 1153(h)(3), which addresses how to treat an alien who "ages out" when he/she reaches age 21, and consequently loses "child"

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amicus curiae* and their counsel made any such monetary contribution.

status under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, after a relative has filed a visa petition on which the alien is a beneficiary. As a result, untold numbers of children are separated from U.S. citizen and legal resident family members solely because they "age-out," i.e. turn 21, and qualify under preference categories that the BIA has deemed ineligible for the protections of the CSPA.

CLINIC respectfully submits this brief to (1) explain the fundamental role of family unity in both the Catholic Church's teachings and in federal immigration policy; (2) demonstrate—by providing details about the lives of individuals who have been denied the benefit of the CSPA by the BIA's ruling—that the Government position is inconsistent with that interest in family unity; (3) explain more fully the workings of the complex immigrant visa allocation system that the CSPA was intended to ameliorate, and clarify that allowing Respondents to retain their priority dates is not a zero-sum game; and (4) illustrate the fallacy of the Government's premise—that family ties to the citizen and/or lawful permanent resident relative are not sufficiently strong and valuable for individuals such as Respondents—for deferring to the BIA.

SUMMARY OF THE ARGUMENT

I. Family unity is a goal shared by many, including the Catholic Church, which views families as the building blocks of society and recognizes the special need that immigrants have for their families.

Likewise, federal immigration law seeks to keep parents and their children together. Examples of federal laws privileging families are many. For ex-

ample, federal law grants the largest number of annual visas to family members of U.S. citizens and lawful permanent residents, and gives the Attorney General discretion to waive bars on admission out of "family unity" concerns. Immigrants may also seek cancellation of removal where removal would cause exceptional hardship to their families, and, when enforcing the removal provisions, the government has long exercised its prosecutorial discretion in a manner that promotes family unity. It is not surprising that concerns for family would impact the immigration laws. The institution of the family is deeply rooted in this nation's history and traditions, and receives constitutional protection. Promoting family stability, moreover, remains a modern goal, as evidenced by current federal law (outside the immigration context as well), and modern empirical research.

The Government's interpretation of 8 U.S.C. § 1153(h) here undermines the federal policy of keeping families together. A few examples provided in this brief of children who "aged out" due to long delays illustrate the devastating effect the Government's position has on families.

II. The Government is wrong to suggest that allowing Respondents and other similarly situated individuals to retain their priority dates is a zero sum game. Without quantifying the wait for those already in line where Respondents would be added under the Ninth Circuit's reading of the statute, the Government implies that the wait of nine years or longer saved for Respondents will cause the same wait to be added to those already in line. That is not mathematically correct. Rather, while the wait saved is approximately nine years for most applicants, the

wait added to those in the line where Respondents will be placed is likely to be far less, as outlined below.

Furthermore, for the individuals from oversubscribed countries, such as the Philippines and Mexico, the current wait may be 30 and 100 years, respectively, to obtain visas. That is, realistically, those individuals cannot expect to receive visas. Thus, from a practical standpoint, adopting Respondents' views would not result in any disruption of any settled expectations. But, allowing Respondents to retain their priority dates would actually keep many of them with their families.

III. The Government urges that the CSPA provision is ambiguous, and so urges the Court to defer to the BIA's interpretation because it is reasonable. However, in advocating the wisdom of the BIA's reading, the Government endorses the BIA's view favoring applicants with both legal permanent resident ("LPR") parents, rather than those who were initially derivative beneficiaries of a citizen grandparent's, aunt's, or uncle's application. Thus, the Government effectively suggests that those with two LPR parents are more worthy to get visas than those with one LPR parent and at least one *U.S. citizen* relative. As a threshold matter, the premise of this assertion is factually incorrect. Frequently, derivative beneficiaries also have two LPR parents, but only one was needed to file after these individuals aged out.

Moreover, the clear implication of the Government's position is that family unity values do not operate across generations or beyond immediate nuclear family units. This is counter to evidence and experience, as this Court has long acknowledged. Indeed,

this Court has repeatedly recognized the paramount role grandparents and other extended family members may play in keeping families functioning. The Court has previously emphasized that such extended families are particularly wide-spread and necessary for the survival of immigrant families: in part because of a tradition in many parts of the world of families being defined in terms wider than nuclear, and also because frequently immigrants start out at the bottom of the socio-economic scale and pooling resources helps them to adjust to the new life in the United States. Likewise the Church views families as extending beyond a narrow nuclear family.

In sum, the Government's interpretation of the CSPA is detrimental to family unity, and relies on incorrect assumptions about the functioning of the visa system and about the nature of family ties.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF THE CSPA IS COUNTER TO THE CATHOLIC CHURCH'S AND FEDERAL GOVERNMENT'S PROMOTION OF FAMILY UNITY

A. Keeping Families Together And Promoting Family Unity Are The Fundamental Guiding Tenets Of The Church's Teachings And Church's Works

The Catholic Church counts over 68 million Americans as members—about 22 percent of all Americans. And it has long shared Congress's dedication to stable families. According to Catholic social teaching, the family is the fundamental building block of society. The 1963 encyclical by Blessed John XXIII, *Pacem in Terris, #16,* states: "The family... must be regard-

ed as the natural, primary cell of human society. The interests of the family, therefore, must be taken very specially into consideration in social and economic affairs, as well as in the spheres of faith and morals. For all of these have to do with strengthening the family and assisting it in the fulfillment of its mission." According to Church teaching, families have a number of natural rights, including "the right to exist and to progress as a family" and the right to a societal structure that allows them "to live together." Holy See, Charter of the Rights of the Family arts. 6, 10 (Oct. 22, 1983), *available at* http://www.vatican.va/roman_curia/pontifical_councils/family/documents/—rc_pc_family_doc_19831022_family-rights_en.html.

The Church also believes that "[t]he families of migrants have the right to the same protection as that accorded other families," including the "*right to see their family united as soon as possible.*" *Id.* art. 12 (emphasis added). If anything, family concerns are heightened for immigrants, as they "are even more in need of their own family, since for those who are far from home family support is indispensable." Archbishop Agostino Marchetto, Address in Brussels, Belgium (July 10, 2007), *available at* http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070710_migrazione-sviluppo_en.html.

The U.S. Conference of Catholic Bishops believes that the family preference system in the United States "[c]ontinues to experience considerable backlogs, prolonging the separation of families. The 1996 immigration laws have torn apart families that have established themselves in the United States over many years. . . ." USCCB, *Welcoming the Stranger*

Among Us: Unity in Diversity (Nov. 15, 2000), http://www.usccb.org/issues-and-action/cultural-diversity/pastoral-care-of-migrants-refugees-and-travelers/resources/welcoming-the-stranger-among-us-unity-in-diversity.cfm#introduction.

The Church affirms the importance of family unity through a pastoral letter written by the Bishops of the United States and Mexico: "We witness the vulnerability of our people involved in all sides of the migration phenomenon, including families devastated by the loss of loved ones who have undertaken the migration journey and children left alone when parents are removed from them." USCCB, *Strangers No Longer, Together on the Journey of Hope* (Jan. 22, 2003) http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-together-on-the-journey-of-hope.cfm.

B. Family Unity Represents The Cornerstone Of The Federal Immigration Policy

a. Federal immigration law similarly values keeping parents and their children together. Both modern provisions, and provisions dating to the original INA, underscore this "intention . . . regarding the preservation of the family unit." H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1681; *see* H.R. Rep. No. 101-723(I), at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6717 (referring to "family reunification" as "the cornerstone of U.S. immigration policy"); S. Rep. No. 89-748, at 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332 (describing "[r]eunification of families" as "the foremost consideration").

This Court has recently reiterated that this important federal objective infuses myriad aspects of

the immigration law and its judicial interpretation. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court explained that considerations of family ties and family safety form a substantial part of the discretion in the enforcement of immigration laws:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to *support their families*, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including *whether the alien has children born in the United States*, long ties to the community, ... Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission . . . [where] enduring conditions that *create a real risk that the alien or his family will be harmed upon return.*

Id. at 2499 (emphases added). *See also Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012) ("We agree—indeed, we have stated—that the goals respondents identify [providing relief to aliens with strong ties to the United States and promoting family unity] underlie or inform many provisions of immigration law.") (citing *Fiallo v. Bell*, 430 U.S. 787, 795, n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 (1966)).

Decisions by the Courts of Appeals further illustrate the application of these principles of fostering family unity in various immigration contexts. *See,*

e.g., *Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) (holding that petitioner's failure to become a lawful permanent resident before turning eighteen years old does not bar him from claiming derivative citizenship from his parents, and emphasizing that this reading is consistent with the "prevailing purpose of the INA," which is to implement the "underlying intention of our immigration laws regarding the preservation of the family unit"); *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) ("It is consistent with Congress's remedial purposes . . . to interpret the statute's ambiguity . . . in a manner that will keep families intact."); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Mufti v. Gonzales*, 174 F. App'x 303, 306 (6th Cir. 2006) ("Congress's intent is clear: family unification is one of the highest goals of our immigration law."); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The [INA] was intended to keep families together," and "should be construed in favor of family units.").

Congressional enactments, especially regarding entry and removal, are notable for reflecting these concerns. With respect to entry, as a general matter and apart from the specific provisions in question here, Congress has long "felt that, in many circumstances, it [is] more important to unite families and preserve family ties than it [is] to enforce strictly" arbitrary numerical quotas on the number of immigrants that may enter this country. *Errico*, 385 U.S. at 220. Thus, Congress preserves the largest number of visas available each year for family members of U.S. citi-

zens and permanent residents. *See* 8 U.S.C. § 1151(a), (c). Federal law generally places no cap on the number of children, spouses, and parents of U.S. citizens that may enter, *id.* § 1151(b)(2)(A)(i), and allocates a substantial percentage of visas to family members of permanent residents and U.S. citizens, *id.* §§ 1151(a)(1), 1153(a).

In addition to this general "[p]reference allocation for family-sponsored immigrants," *id.* § 1153(a), federal law gives the Attorney General additional discretion "to assure family unity" in specific situations. *See, e.g.*, *id.* §§ 1157(c)(3), 1182(d)(11). With respect to an immigrant seeking adjustment of status to lawful permanent resident, for example, the Attorney General may take into account family unity by waiving otherwise applicable bars to admission. *See id.* § 1159(c); *see also id.* § 1182(a)(3)(D)(iv). Likewise, federal law allows the Attorney General to waive the bar against the admission of immigrants who have assisted other undocumented immigrants to enter, if they have assisted only a parent, spouse, or child. *Id.* § 1182(d)(11). "[F]amily unification [was] . . . the motivation behind the creation of [these] waiver[s]." *Mufti*, 174 F. App'x at 306.

Family considerations also affect removal proceedings for immigrants already here. Federal law, for example, permits cancellation of removal for an undocumented immigrant if the removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child." 8 U.S.C. § 1229b(b)(1)(D). And while a lawfully admitted immigrant is removable if he assists in bringing an undocumented immigrant into the United States, the Attorney General may waive this provision if the law-

fully admitted immigrant only assisted an immediate family member. *Id.* § 1227(a)(1)(E)(iii).

The executive branch of the federal government also gives preferential consideration to family ties in its enforcement of the general removal provisions. "When weighing whether an exercise of prosecutorial discretion may be warranted" in a particular case, federal agents must consider such factors as "the person's . . . family relationships" and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency* 4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. Family ties also count as an important discretionary factor when the executive determines whether the Government will grant asylum to an immigrant. *See, e.g., Huang v. I.N.S.*, 436 F.3d 89, 101 (2d Cir. 2006).

Similarly, in its briefs to this Court, the Government acknowledged that immigration laws foster family unity. Most recently, in its brief to this Court in *Arizona v. United States*, the Government confirmed its understanding and endorsement of the "judgment that 'many who enter illegally do so for the best of motives—to seek a better life for themselves and their families.'" Brief for the United States at 24, *Arizona*, 132 S. Ct. 2492 (No. 11-182) (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46 (1986)). The Government likewise acknowledged that "the existence of family ties in the United States is a positive factor to be considered in determining whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discre-

tion. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998)." Brief for Petitioner at 29, *Gutierrez*, 132 S. Ct. 2011 (Nos. 10-1542, 10-1543).

b. The idea that federal law should promote family unity is hardly limited to immigration, but instead reverberates throughout our laws. "The integrity of the family unit has found protection in" our founding document, the Constitution itself. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court has recognized a right to traditional marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and parents also have a liberty interest in their children's upbringing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). Numerous historical sources confirm the importance of marriage and family in American tradition. *See, e.g.*, Noah Webster, *An Am. Dict. of the English Language* (1st ed. 1828) (noting purposes of "marriage"); William Blackstone, 1 *Commentaries* 422 (same).

Promoting family stability, moreover, remains a modern goal. It is evident in a diverse array of modern federal legislation, ranging from the Family and Medical Leave Act (which was designed to promote "the stability and economic security of families," 29 U.S.C. § 2601(b)(1)), to the Indian Child Welfare Act (which was passed "to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902). Current empirical sources confirm the ongoing importance of family stability. *See, e.g.*, Kristen Ander-

son Moore, et al., *Marriage From a Child's Perspective, Child Trends Res. Brief* 6 (2002) ("the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage").

C. The Government's Interpretation of Section 1153(h)(3) Fails To Account For These Important Federal Objectives Of Keeping Families Together

The Government's interpretation of the visa allocation provision at issue here has impacted numerous families, leading to the separation of family members, disruption of family life, and the deportation of long-time U.S. residents who entered as children a decade or more ago. These individuals, some of whose tribulations and struggles are described below, have all been denied the CSPA eligibility under *Matter of Wang*, and would have qualified for an immigrant visa under the Ninth Circuit's interpretation of the CSPA.

1. *C-N-D-D.* In 1979, a decade before C-N-D-D was born, her grandparents, aunts, and uncles fled Vietnam and entered the U.S. as refugees. Of the entire extended family, only C-N-D-D's mother and great-grandmother remained in Vietnam. C-N-D-D's mother was very close to her great-grandmother and refused to leave her. The family accepted her decision but never gave up hope that C-N-D-D's mother would join them in the U.S. The family sent remittances to C-N-D-D's mother which she depended on to survive.

Living in a small cottage in the rural city of Ninh Hoa, C-N-D-D's mother married, gave birth to C-N-D-D in 1989, and divorced. On December 7, 1998, when

C-N-D-D was 10 years old, her grandfather filed an F-2B visa petition for C-N-D-D's mother. C-N-D-D was the derivative beneficiary of the visa petition her grandfather filed on behalf of her mother. In 2008, C-N-D-D's grandfather became a U.S. citizen.

In April 2011, C-N-D-D's mother became a legal resident of the U.S. However, C-N-D-D was over 21 at the time her mother immigrated and was no longer a derivative beneficiary of the 1998 visa petition filed by her grandfather. In August 2011, C-N-D-D's mother filed an F-2B petition for C-N-D-D. *See* State Department Correspondence (on file at CLINIC office). Under *Matter of Wang*, C-N-D-D is unable to retain the 1998 priority date established when her grandfather filed the visa petition; therefore she will be subject to an additional waiting period of more than five years. The October 2013 Department of State Visa Bulletin indicates that immigrant visas are available for F-2B beneficiaries in the World-Wide category whose visa petitions were filed before March 1, 2006. C-N-D-D's petition was filed in August 2011.

The family of C-N-D-D has struggled to reunite in the U.S. after being separated for decades. Most of the family is composed of U.S. citizens, and one of C-N-D-D's uncles is a Los Angeles Deputy Sheriff, while another is an employee of the U.S. Postal Service. All plan to assist C-N-D-D integrate into U.S. life. The family found community college nursing and English classes for C-N-D-D to take in the U.S. C-N-D-D's mother is distraught and worried about her daughter who is isolated and alone in Vietnam.

2. *M-M-G-M:* Due to deep historical and cultural links between the U.S. and the Philippines, migra-

tion from the Philippines is significant. *See* Migration Policy Institute, "The Philippines' Culture of Migration," January 2006; Asian Pacific American Legal Center of Southern California, "A Devastating Wait: Family Unity and the Immigration Backlogs" (2008). Filipinos like M-M-G-M seeking to immigrate to the U.S. experience interminable waiting periods. The October 2013 Department of State Visa Bulletin indicates that the waiting period for immigrant visas is longer for the Philippines in all preference categories with the exception of Mexican beneficiaries in the F-1, F-2A, and F-2B categories. *See* October 2013 Visa Bulletin, *available at* http://travel.state.gov/visa/bulletin/bulletin_6062.html.

In January 1984, when M-M-G-M was one year old, his U.S. citizen aunt filed a visa petition on behalf of M-M-G-M's mother. M-M-G-M, his siblings, and his father were derivative beneficiaries of that petition.

In December 2006, M-M-G-M's parents and three siblings obtained legal residency and immigrated to the U.S. based on the petition M-M-G-M's aunt had filed nearly 23 years earlier. M-M-G-M was not permitted to immigrate with the rest of his family because he had turned 21 in 2003. Instead M-M-G-M lived alone in the family home in the Philippines and worked as a teacher.

M-M-G-M traveled to the U.S. on a visitor's visa in 2007. Relying on the January 1984 priority date his mother had established through the visa petition his aunt filed, on July 31, 2007 M-M-G-M's mother filed a visa petition for him and at the same time M-M-G-M filed for adjustment of status. Upon filing for adjustment and receiving employment authorization,

M-M-G-M began working at a warehouse company. On August 29, 2012, his application for adjustment was denied by the USCIS Los Angeles Field Office Director. *See* Notice of Decision on I-485, USCIS Acting Field Office Director Ana Chau. (August 29, 2012) (on file in the CLINIC office). The USCIS decision determined, in accord with *Matter of Wang*, that M-M-G-M was unable to retain the January 1984 priority date and therefore must continue to wait until a visa becomes available for a July 2007 priority date. Following the Ninth Circuit's *en banc* opinion in *Cuellar de Osorio,* M-M-G-M's adjustment application was reopened. The application is now held in abeyance pending this Court's opinion.

If M-M-G-M- is treated as having a priority date of July 2007, a visa likely will not be available for him for many years. According to the October 2013 Department of State Visa Bulletin, immigrant visas are available for F-2B beneficiaries from the Philippines who filed petitions before February 8, 2003. At the very least, the wait for the visa will be another four years, but likely longer because the backlog does not progress linearly. *See* pages 20-21 below.

3. *R-M-B.* R-M-B's family is from the Philippines as well. In November 1989, when R-M-B was nine years old, his U.S. citizen grandfather filed a visa petition on behalf of R-M-B's mother. R-M-B, his three siblings and his father were derivative beneficiaries of that petition. In January 2003, R-M-B's parents and three siblings obtained legal residency and immigrated to the U.S. based on the petition R-M-B's grandfather had filed 14 years earlier.

R-M-B was not permitted to join the rest of his family because he had turned 21 in 2001. Instead R-

M-B lived with his cousins in Manila waiting to immigrate to the U.S. through a new F-2B visa petition filed for him in January 2004 by his mother. During the time R-M-B stayed behind in the Philippines, he attended college, becoming a nurse.

R-M-B traveled to the U.S. on a visitor's visa in 2007. After living apart from his family for three years, R-M-B settled down with his family in the U.S. Relying on the November 1989 priority date his mother had established through the visa petition his grandfather filed, R-M-B filed for adjustment of status. Upon filing for adjustment of status and receiving employment authorization, R-M-B began working as a nurse in a hospital. On April 27, 2011 his application for adjustment was denied by the USCIS District Director for San Diego. *See* Notice of Decision on I-485, USCIS District Director Paul M. Pierre (Apr. 27, 2011) (on file in the CLINIC office). The USCIS decision determined, in accord with *Matter of Wang*, that R-M-B was unable to retain the November 1989 priority date and therefore must continue to wait until a visa becomes available based on a January 2004 priority date.

R-M-B moved to San Antonio in June 2012, and filed his I-485 petition in February 2013. He was interviewed at the San Antonio Field Office on May 28, 2013, and was approved that same day, in accordance with *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011), where the Fifth Circuit interpreted the CSPA in the same manner as the Ninth Circuit did. And although R-M-B did get his green card eventually, he spent a number of years unnecessarily separated from his family and then living a shadow existence at the risk of deportation—an ordeal that could have been

avoided had the BIA only interpreted, from the outset, the CSPA properly.

R-M-B's story is an illustration that, contrary to the Government's warnings, *see, e.g.*, SG Br. at 36, 38, there is nothing "odd," let alone "destabiliz[ing]," about applying the CSPA in accordance with the Fifth and Ninth Circuit's interpretation. As further shown below (Part II), the Government's assertions of inevitable "substantial[] disrupt[ions]" to the statutory scheme under the Ninth Circuit's interpretation, *id.* at 38, are mere speculations without factual basis.

* * *

These examples are representative of numerous other cases that CLINIC has encountered through its nationwide programs. In each, families have been needlessly kept apart by the BIA's refusal to implement the CSPA according to its terms.

II. CONTRARY TO THE GOVERNMENT'S ASSERTION, ALLOWING RESPONDENTS TO RETAIN THEIR PRIORITY DATES IS NOT A ZERO-SUM GAME AND WOULD NOT LEAD TO SIGNIFICANT BETRAYED EXPECTATIONS

A. Proper Calculation Of The Delays Illustrates That Allowing Respondents To Retain Their Original Priority Dates, Thereby Avoiding A Nine Year Or Longer Wait, Would Not Impose The Same Wait On Others In Line

The Government claims that changing priority dates for respondents is a "zero-sum game," which would push other aliens back in line. SG Br. at 40. *See also id.* at 41 ("Aliens pushed back in the line

might see their waiting times increase substantially."); *id.* at 51 ("The en banc majority's contrary reading of the statute . . . would 'not permit more aliens to enter the country or keep more families together,' but would negatively affect many aliens who have been waiting in visa lines for long periods of time."). Although the Government does not quantify the alleged push-back in the waiting time, it suggests that it is likely to be "significant" and therefore, will create "significant unfairness." *Id.*

The implication of that position is that allowing each of the individuals, such as respondents, to retain their priority dates, thereby avoiding an additional nine years or longer wait, also adds the same number of years to everyone else's wait in line. But this implication obscures the truth. Doing the math, examining how visas are allocated, and analyzing how the wait is calculated in light of the backlog reveals that the Government's implication is flat wrong. Below is the analysis of the currently available statistics to make an assessment of the effect of adopting the Ninth Circuit's position.

To determine whether a visa applicant in a family-based preference category is "current," one must compare the applicant's priority date with the date listed in the monthly Department of State Visa Bulletin. The priority date is the official date that the USCIS has determined that the applicant's petition was filed. To be current, the priority date must be earlier than the date listed on the Visa Bulletin that corresponds to the preference category and country of nationality.

The Department of State determines visa availability based on statutory limits for each preference cate-

gory, per country caps, and estimated demand. For example, in the F-2A category, there is an annual limit of 87,900 visas that can be used in any fiscal year, but no per country caps. In contrast, the F-2B category has both a much smaller annual limit of 26,266 visas that can be used in any fiscal year, as well as a per country limit of 7 percent of this number (1,838 visas).

It is impossible to gauge future visa availability by looking only at the Visa Bulletin for a specific month, because one must take into account the actual size of the backlog in each category. That is best determined by looking at the Department of State's Annual Immigrant Visa Waiting List Report, as well as a history of visa advancement in that particular category. For example, looking only at the Visa Bulletin for October 2013 would reveal that applicants in the F-2B category for countries other than Mexico and the Philippines are "current," i.e. currently eligible for visas, if they have a priority date before March 1, 2006. But that seven-year and seven-month period between that date and October 1, 2013 does not mean that applicants covered by petitions in the F-2B category filed today will become current in that same period of time. Similarly, priority dates prior to March 8, 1994 are now current for Mexicans in the F-2B category, but that does not mean that applicants covered by such petitions filed today will be current in 19 years. In other words, the backlog does not progress linearly.[2] In fact, the actual time delays are quite astounding.

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[2] Furthermore, the State Department cautions in several of its publications that visa applicants should be aware that cut-off

There are only 26,266 visas available each year in the F-2B category. And there are three oversubscribed countries—Mexico, the Philippines and Dominican Republic—that are at or above the 7 percent per-country cap. *See* State Department, Annual Numerical Limits FY 2013, available at http://www.travel.state.gov/pdf/WaitingListItem.pdf. To determine the number of visas available "worldwide" to non-oversubscribed countries in the F-2B category, one must first calculate those designated to the three over-subscribed countries. Each country is allowed a maximum of 7 percent of the total number of visas available in the F-2B category (26,266 x .07 = 1,838). Thus, the number designated to the three over-subscribed countries is 5,514 (3 x 1,838). Therefore, the number of visas available to other countries is 20,752 (26,266 - 5,514). The total number of pending F-2B applicants worldwide as of November 1,

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dates may change. *See, e.g.*, Dep't of State, The Operation of the Immigrant Numerical Control System, *available at* http://www.travel.state.gov/pdf/Immigrant%20Visa%20Control%20System_operation%20of.pdf ("Fluctuations can cause cut-off date movement to slow, stop, or even retrogress. Retrogression is particularly possible near the end of the fiscal year as visa issuance approaches the annual limitations."); Dep't of State, Visa Bulletin For November 2013, *available at* http://travel.state.gov/visa/bulletin/bulletin_6168.html (noting that it may "become[] necessary during the monthly allocation process to retrogress a cut-off date"); *see also id.* ("There would be no expectation . . . that sufficient numbers would be available for the processing of cases which subsequently became eligible for final action during that month. . . . The availability of additional numbers is subject to change at any time and should never be taken for granted. This is especially true late in the fiscal year when numerical allocations are often close to or at the annual limits.").

2012 was 486,597, according to the Annual Immigrant Visa Waiting List Report. The number of pending F-2B applicants from the three oversubscribed countries was 307,547. Therefore the number of pending F-2B applicants from the non-oversubscribed countries is 179,050 (486,597 – 307,547). To arrive at an estimate of the length of time it will take for these pending applicants to become current, divide the number of applicants by the annual limit available to non-oversubscribed countries (179,050 ÷ 20,752 = 8.6 years). Thus, an F-2B applicant from a non-oversubscribed country who filed a petition today is likely to become current in April 2022.

This is a fairly accurate assessment of the length of time it will take to get through the present backlog in that category. While some F-2B visa applicants during that time will die, marry, withdraw their applications, or convert to a more advantageous category, this decrease will be offset to some extent by the number of children born to these applicants, who will be added to that backlog as after-acquired derivative beneficiaries.

Annually, the F-3 category is allocated 23,400, and the F-4 category, 65,000, visas. *See* Dep't of State, Annual Numerical Limits FY 2013, *available at* http://www.travel.state.gov/pdf/Web_Annual_Numerical_Limits.pdf. Most of these visas go to principals, and only some to their derivatives. The derivatives who age out are but a small part of that total number of the F-3 and F-4 categories (88,400). That class is likely to have a very significant attrition rate, as those denied the retention of their priority dates either gave up the idea of immigrating or found an al-

ternative way to obtain a visa, such as through F-1 family first preference category.

We are not aware of any published statistics as to the number of people who would be added to the F-2B line in the event of affirmance of the Ninth Circuit's decision. However, even if we assume that 10,000 aged-out children are added to the F-2B line, that would push others in the F-2B line back by about six months, as the F-2B category has 26,266 visas available annually. *Id.* That is less than 1/17 of the wait that these individuals would be spared. Moreover, once that backlog clears up, there will likely be only a few thousand per year joining the F-2B line due to the CSPA; that would affect those already waiting by just a few months.

B. Recent Filers From The Oversubscribed Countries Are Not Realistically Affected

Individuals from oversubscribed countries who have just filed their papers and are in the line where respondents would be placed are currently expecting to wait around 100 years to obtain visas.

The number of F-2B visas available to Mexico is 1,838. As of November 1, 2012, the number of pending F-2B applicants from Mexico was 201,225. The length of time it will take to clear up the current backlog is approximately 109 years (201,225 ÷ 1,838). Thus, a Mexican who files a petition today in the F-2B category can expect it to become current at the end of 2122.

The number of F-2B visas available to the Philippines is also 1,838. The number of pending F-2B applicants from the Philippines as of November 1, 2012 was 50,099. The length of time it will take to clear up the current backlog is approximately 27 years

(50,099 ÷ 1,837). Thus, a Filipino who files a petition today in the F-2B category can expect it to become current at the end of 2040.

Therefore, from the practical standpoint, contrary to the Government's assertion, adopting Respondents' arguments would not cause any "disrupt[ion of] the settled expectations" (SG Br. at 44) of obtaining a visa for citizens of these countries.

III. THE GOVERNMENT'S *CHEVRON* STEP TWO ARGUMENT RELYING ON THE RELATIVE STRENGTH OF FAMILY TIES FOR THE FAVORED GROUP IS INCORRECT

Claiming that the provision is ambiguous, the Government asks the Court to defer to the agency's interpretation. In urging that the agency interpretation is reasonable, the Government effectively suggests that those with two LPR parents are more worthy to get visas in terms of protecting family integrity than those with one LPR parent and one U.S. citizen grandparent or aunt or uncle. *See* SG Br. at 45-47; 50-52.

As a threshold matter, the premise of this assertion is factually incorrect. Frequently, individuals, such as Respondents' children, also have two LPR parents, but only one was needed to file after these individuals aged out.

Moreover, the clear implication of the Government's position is that family unity values do not operate across generations or immediate nuclear family units. This is counter to evidence and experience, as this Court has long acknowledged. Indeed, this Court has repeatedly recognized the paramount role grandparents and other extended family members may play in keeping families functioning. In *Moore*

v. City of East Cleveland, 431 U.S. 494 (1977), the Court invalidated an ordinance which made it a crime for a homeowner to have living with her a son and a grandson, as well as the second grandson who was the cousin of the first grandson. The plurality emphasized the tradition of extended families in the history of our Nation: "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504. The Court noted that even with the decline of an extended family in modern times, "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family," has not been erased. *Id.* at 505. The Court observed that "[o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." *Id.* The Court further acknowledged that its child rearing decisions have recognized that grandparents or other relatives may take on major responsibilities in the household especially in times of adversity. *Id.* ("the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life").

Concurring opinions have made similar observations, emphasizing the importance of extended families for ethnic and racial minority groups, including immigrants and those with limited economic means. *Id.* at 508 (Brennan, J., Marshall, J., concurring) (examining historical and sociological evidence). *See also Troxel*, 530 U.S. at 64 (plurality op.) (examining statistics from the U.S. Department of Commerce and

explaining that "grandparents and other relatives undertake duties of a parental nature in many households" and "play an important role" in children's lives).

Similarly, the Church has recognized the importance of the extended family. The Church has instructed that "[t]he family should live in such a way that its members learn to care and take responsibility for the young, the old, the sick, the handicapped, and the poor." Catechism 2208, available at http://www.vatican.va/archive/ENG0015/__P7T.HTM. Likewise, the Church explained that "[t]he fourth commandment illuminates other relationships in society," which means that families are interconnected and extend beyond the narrow definition of a nuclear family: "In our brothers and sisters we see the children of our parents; in our cousins, the descendants of our ancestors . . . ." *Id.* at 2212.

In sum, the Government's interpretation of the CSPA is detrimental to family unity—the goal that both Congress and the Church recognize and foster, and relies on incorrect assumptions about the functioning of the visa system and about the nature of family ties.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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NOVEMBER 4, 2013

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AMICUS CURIAE BRIEF

No. 12-930

IN THE

Supreme Court of the United States

ALEJANDRO MAYORKAS, *et al.*,

Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the provisions of the Child Status Protection Act, 8 U.S.C. § 1153(h)(3), apply to all derivative-beneficiary children.

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BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan coalition of Members of Congress who were serving in 2002, when the Child Status Protection Act (CSPA) was passed. The Members care deeply about the preservation of family unity among immigrant families and the fairness of our country's immigration procedures. To promote these goals, and cure the harsh and unfair effects of prior immigration procedures, they crafted the CSPA to protect *all* children who seek to immigrate to this country from the consequences of "aging out," that is, turning 21 before a green card is available for them. The Members submit this brief to confirm that this outcome was their unmistakable purpose.

The Members also seek to inform the Court that the language used in the CSPA is unambiguous: *all* derivative-beneficiary children who age out *shall* be entitled to automatic conversion and *shall* retain their original priority date. The Members disagree with the Solicitor General's view that there is "tension" in the statute and that its text should be disregarded in light of current agency practices. This Court should emphasize the duty of all federal agencies to execute the unambiguous mandates of Congress.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Samuel D. Brownback has been the Governor of Kansas since 2011. Before assuming that office, he served as a Republican Member of the House of Representatives from Kansas between 1995 and 1996 and as a Republican Senator from Kansas between 1996 and 2011. Then-Senator Brownback served on the Senate Judiciary Committee from 2001 through 2003 and from 2005 through 2009. He was the Ranking Member of the Subcommittee on Immigration in 2002.

Dianne G.B. Feinstein has been a Democratic Senator from California since 1992 and a member of the Senate Judiciary Committee since 1993. In that role, she introduced the original version of the CSPA in the Senate on April 1, 2001. Senator Feinstein served on the Subcommittee on Immigration in 2002.

Orrin G. Hatch has been a Republican Senator from Utah since 1977. Since joining the Senate, he has been a member of the Senate Judiciary Committee, serving as its Chairman from 1995 through 2001 and from 2003 through 2005, and as its Ranking Minority Member from 1993 through 1995 and from 2001 through 2003.

John S. McCain III has been a Republican Senator from Arizona since 1987 and also served as a Republican Member of the House of Representatives from Arizona between 1983 and 1987.

Robert Menendez has been a Democratic Senator from New Jersey since 2006 and also served as a Democratic Member of the House of Representatives from New Jersey between 1993 and 2006. He was the author of the Reuniting Families Act in the 110th and 111th Congresses.

Charles E. Schumer has been a Democratic Senator from New York since 1999 and also served as a Democratic Member of the House of Representatives from New York between 1981 and 1999. Since

joining the Senate, he has been a member of the Senate Judiciary Committee and has served as Chairman of the Subcommittee on Immigration, Refugees, and Border Security since 2009. Senator Schumer served on the Subcommittee on Immigration in 2002.

SUMMARY OF ARGUMENT

I. Before the CSPA's passage, an alien child who was the derivative beneficiary of a visa petition filed for his parent, but who turned 21 before his parent received that visa, was required to begin the application process anew, losing all credit for the many years spent waiting in line. Because of this rule, families whose children turned 21 before a visa became available faced an impossible choice: either stay with their child and give up the opportunity for a new life in this country, or immigrate to the United States and leave behind any children who had turned 21.

To correct this problem, Congress, with overwhelming bipartisan support and the signature of President George W. Bush, passed the CSPA, which allows alien children who turned 21 before a visa became available to retain their priority date for purposes of a new sponsorship category applicable to adults. In this way, Congress sought to give credit to immigrant children for the years they had waited for a visa and preserve unity among immigrant families. Congress enacted the CSPA to comprehensively serve these goals. As the statute makes clear, all derivative-beneficiary children receive the CSPA's benefits.

II. The language of the CSPA unambiguously provides priority-date retention and automatic con-

version for any derivative-beneficiary child who ages out.

The relevant statutory provision, 8 U.S.C. § 1153(h), contains three paragraphs. The first paragraph provides a modified procedure for calculating an alien child's age that excludes administrative processing delays occurring prior to approval of a petition. The second paragraph, which lists the individuals who receive this modified age calculation, includes *all* derivative-beneficiary children. The third paragraph states that any alien child whose age, after being calculated under paragraph (1), is 21 years or greater shall retain the priority date from his original petition, and his petition will automatically be converted to the appropriate category. Because the age of *every* derivative-beneficiary child is calculated using the paragraph (1) procedure, and because paragraph (3) applies to everyone whose age is calculated under paragraph (1) to be over 21, the plain language of the CSPA requires that any derivative-beneficiary child whose age is calculated to be 21 or older shall receive the full benefits of paragraph (3).

In addition to this clear command on the face of the statute, other textual and structural indicia support this interpretation. *First*, Congress omitted language from a pre-CSPA immigration regulation that allowed priority-date retention but restricted it to derivative beneficiaries of one category (F2A) of petitions. Congress's omission of a comparable limitation in the CSPA further confirms that the statute benefits all derivative-beneficiary children. *Second*, Congress used terminology throughout the CSPA that, if read consistently, indicates that the CSPA covers all derivative-beneficiary children. *Third*, the position of the Solicitor General and Board of Immigration Appeals (BIA) would result in providing au-

tomatic conversion and priority-date retention to the families of lawful permanent resident (LPR) aliens to the exclusion of families of United States citizens.

The Solicitor General cannot muddle the clarity of the CSPA's language by arguing that current procedures employed by the BIA do not allow for automatic conversion of F3 and F4 petitions. According to the Solicitor General, there is "tension" in paragraph (3), which first purports to cover all derivative-beneficiary children but then provides automatic conversion, which allegedly cannot be accomplished for F3 and F4 derivative beneficiaries. But Congress intended automatic conversion to apply to the petitions of F3 and F4 derivative-beneficiary children, and in any event the statute's provision of priority-date retention is independent of automatic conversion. This Court should not allow the Solicitor General to introduce ambiguity into the CSPA where none exists.

ARGUMENT

I. CONGRESS PASSED THE CSPA TO CURE THE UNFAIR EFFECTS OF EXISTING IMMIGRATION REGULATIONS AND PRESERVE FAMILY UNITY.

Under the family-sponsored immigration program, *see* 8 U.S.C. § 1153(a), United States citizens and LPR aliens can petition for their close family members to obtain an immigrant visa. In addition to the sponsored family member, known as the "principal beneficiary," any child of the principal beneficiary is also derivatively eligible for a visa as long as the child does not turn 21—"age out"—before the visa becomes available for the principal beneficiary. *See id.* §§ 1101(b)(1), 1153(d). If a derivative-beneficiary child does age out before a visa becomes available for his parent, he cannot immigrate to the

United States as a derivative beneficiary, but instead must obtain a visa under a different category for adults.

Before Congress's passage of the CSPA, this framework presented a difficult choice for many immigrant families. The parents of a derivative-beneficiary child who aged out were forced either to forfeit their chance at a new life in the United States or to leave behind a family member who followed all the proper immigration procedures but had the ill fortune to turn 21 before a visa became available. Even worse was the plight of the derivative-beneficiary child himself, who was required to move to a different category of visa sponsorship, at which point his clock reset and all credit for the years spent waiting as a derivative-beneficiary child was lost.

A. The CSPA's Enactment

In 2002, Congress passed the CSPA, which, as enacted, cures the age-out defect in the immigration system and allows any alien child who turns 21 before obtaining a visa, including derivative beneficiaries, to have his petition "automatically converted" to a new sponsorship category applicable to adults and to retain his original "priority date"—the date on which his parent's petition was filed—in the new category. Under this new system, when the derivative-beneficiary child moved to his new sponsorship category, he would receive full credit for the time he spent waiting for a visa and would obtain a visa much sooner, allowing him to reunite with the rest of his family.

The CSPA was met with overwhelming bipartisan support, originally passing the House by a unanimous vote of 416-0. *See* 147 Cong. Rec. D539 (June 6, 2001). The Senate later sponsored an amendment to the bill, which originated in the Senate Judiciary

Committee with unanimous consent and passed the Senate by a unanimous voice vote. *See* 148 Cong. Rec. S5558-61 (June 13, 2002).

During the House's discussion of the Senate amendment, Representatives voiced strong, bipartisan support for the bill. *See* 148 Cong. Rec. H4991 (July 22, 2002) (statement of Rep. Sensenbrenner) ("This bill is a fine example of how we and the other body can work together in a collaborative fashion. Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens the reuniting of legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions."); *ibid.* (statement of Rep. Jackson-Lee) ("[L]et me rise to support what I think is a very special and important piece of legislation that has come about from the Committee on the Judiciary in a bipartisan manner . . . . I believe this is an important bill that helps those who are aging out and brings families together."). Ultimately, the bill passed the House by a unanimous voice vote, *see id.* at H4992, and was signed into law by President George W. Bush.

Unfortunately for the respondents and many other immigrant families, the BIA has applied the CSPA's benefits only to a narrow category of immigrants: principal beneficiaries of F2A petitioners (*i.e.*, minor children of LPR aliens), as well as children who are the derivative beneficiaries of an F2A petition (*i.e.*, a child whose sponsored parent is the spouse of an LPR alien). *See Matter of Wang*, 25 I. & N. Dec. 28, 39 (BIA 2009). The BIA refuses to extend the CSPA's protections to children like those of respondents, who sought derivative eligibility because their sponsored parent is the adult child (F3) or sibling (F4) of a United States citizen. *See ibid.*

The Members disagree with the BIA's narrow interpretation of the CSPA and, as those who drafted and approved the statute, assert that the CSPA, as enacted, awards precisely the sort of protection that respondents now seek and that the Fifth and Ninth Circuits have held the CSPA provides. *See* Pet. App. 24a; *Khalid* v. *Holder*, 655 F.3d 363, 374-75 (5th Cir. 2011).

B. Congress Intended The CSPA To Promote Family Unity And Fairness In Our Immigration System By Extending Its Coverage.

Before the CSPA, a child who was derivatively eligible and who aged out before a visa became available for his parent lost that eligibility. Accordingly, that child could not immigrate contemporaneously with his parent, but had to enter another category of sponsorship and begin anew the years'—sometimes decades'—long wait for a visa.

When she introduced the original version of the CSPA in the Senate, Senator Feinstein stated that "a family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind" simply because of the "growing immigration backlogs [that] caused the visa to be unavailable before the child reached his 21st birthday." 147 Cong. Rec. S3275 (Apr. 2, 2001) (statement of Sen. Feinstein). Immigrant parents thus had to "decide to either come to the United States and leave their child behind, or remain in the country of origin and lose out on their American dream in the United States." *Ibid.* Senator Feinstein emphasized that the CSPA "would correct these inequities and help protect a number of children who, through no fault of their own, face the conse-

quence of being separated from their immediate family." *Id.* at S3276.

Only through the broad coverage of *all* derivative beneficiaries could the CSPA effectively protect family unity and award credit for the years that families had already waited. The statements of House Members directly before the CSPA's passage recognize as much. Representative Sensenbrenner, for example, noted that the CSPA "addresses three . . . situations where alien children lose immigration benefits by 'aging out'" and referenced as one of those situations "[c]hildren of family[-]sponsored immigrants," that is, derivative-beneficiary children who, pre-CSPA, "would have to apply . . . to be put on the [F2]B waiting list" if the child aged out. 148 Cong. Rec. H4990-91 (July 22, 2002). His statement nowhere indicates an arbitrary intent to limit the CSPA's relief only to F2A beneficiaries. Similarly, Representative Jackson-Lee described the CSPA as "expand[ing] age-out protection to cover . . . [c]hildren of family[-]sponsored immigrants," without limitation. *Id.* at 4991.

The Solicitor General's argument that the CSPA covers *only* beneficiaries of F2A petitions directly conflicts with the primary purpose for which the law was enacted. In enacting this legislation, Congress meant to correct the inequities of the pre-CSPA regime in full.

II. THE CSPA UNAMBIGUOUSLY REQUIRES THE BIA TO EXTEND THE CSPA'S PROTECTIONS TO ALL DERIVATIVE-BENEFICIARY CHILDREN.

The text of the CSPA unambiguously directs that all derivative-beneficiary children are entitled to automatic conversion and retention of priority date, precluding further "interpretation" of the statute's scope by the BIA. Nonetheless, the Solicitor General

insists that the CSPA's priority-date-retention provision can be treated as a mere codification of an immigration regulation that existed at the time of the CSPA's passage, even though the language of the CSPA plainly differs from that regulation. The Solicitor General is attempting to inject ambiguity into the CSPA when the language used by Congress is manifestly clear.

The Members disagree with the Solicitor General's assertion that, because of supposed "tension" in the CSPA, the BIA can reinterpret the meaning of otherwise unambiguous language. This position is an unacceptable effort to revise the plain meaning of a statute under the guise of expert interpretation. This Court should reemphasize the importance of federal agencies' consistent adherence to clearly articulated congressional commands.

A. The Plain Language Of The CSPA Is Unambiguous And Precludes The BIA From Modifying The Statute's Scope.

The language and structure that Congress used to draft the CSPA leaves no room for interpretation as to its scope. All three paragraphs of 8 U.S.C. § 1153(h) should be read together "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), that "fit[s] . . . into an harmonious whole," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959); *see also, e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The first paragraph of Section 1153(h) provides:

> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement [of being under 21 years of age] shall be made using—

> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent) . . . ; reduced by
>
> (B) the number of days in the period during which *the applicable petition described in paragraph (2)* was pending.

8 U.S.C. § 1153(h)(1) (emphasis added). This paragraph provides a form of protection for alien children, including derivative beneficiaries, by excluding the time that a petition is being processed from the calculation of a derivative-beneficiary child's age.

Notably, paragraph (1) states that this modified age calculation applies to any child who seeks a visa under a "petition described in paragraph (2)." 8 U.S.C. § 1153(h)(1)(B). Paragraph (2), in turn, expressly includes all petitions where a child "is a derivative beneficiary under subsection (d)" and that are filed "under subsection (a)," which is the subsection authorizing, *inter alia*, F2A, F3, and F4 petitions. *Id.* § 1153(h)(2)(B); *see also id.* § 1153(a). Congress did not include in paragraph (2) any restriction on which types of derivative-beneficiary children receive the modified age calculation outlined in paragraph (1). Indeed, the Solicitor General acknowledges that paragraph (2) requires *all* derivative-beneficiary children's ages to be calculated in accordance with paragraph (1). *See* Pet. Br. 6.

Paragraph (1), while excluding the time that a petition is being processed from a derivative-beneficiary child's age, does not exclude the time that a derivative-beneficiary child and his parent must

wait for a visa to become available after their petition is approved. Thus, despite the protection of this provision, there is still a significant danger that a derivative-beneficiary child could age out. This is where paragraph (3)—the priority-date-retention provision—becomes relevant.

Paragraph (3) states:

> (3) Retention of priority date
>
> *If the age of an alien is determined under paragraph (1) to be 21 years of age or older* for the purposes of subsections (a)(2)(A) and (d) of this section, the alien's petition shall automatically be converted to the appropriate category and *the alien shall retain the original priority date* issued upon receipt of the original petition.

8 U.S.C. § 1153(h)(3) (emphases added). Paragraph (3) contains only one condition for a child to receive the paragraph's benefits: his age must be determined under paragraph (1) to be 21 years or older. Once this condition is satisfied, automatic conversion and priority-date retention are mandatory. *See ibid.* ("[T]he alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date issued upon receipt of the original petition." (emphases added)).

Subsection (h) therefore provides a double layer of protection against aging out. Paragraph (1) outlines a new way to calculate a child's age in order to ameliorate the effects of administrative delay and will prevent some children from aging out altogether. Paragraph (2) states that this modified calculation applies to, *inter alia*, all derivative-beneficiary children. And paragraph (3) then requires that any child whose age is calculated under the paragraph

(1) formula and still ages out even after that modified calculation *shall* retain his original priority date.

The Members cannot see any ambiguity in the language of paragraph (3). That paragraph explicitly states that it applies to any "alien [whose age] is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. § 1153(h)(3). As the Solicitor General concedes, *see* Pet. Br. 6, the ages of *all* derivative-beneficiary children are calculated under paragraph (1). Thus, the automatic-conversion and priority-date-retention provisions of paragraph (3) unambiguously apply to *any* derivative-beneficiary child whose age is calculated to be over 21.

Under this Court's jurisprudence, "Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Accordingly, "the inquiry is at an end," and "the [C]ourt 'must give effect to the unambiguously expressed intent of Congress.'" *Brown & Williamson*, 529 U.S. at 132 (quoting *Chevron*, 467 U.S. at 843).

B. Other Indicia In The Text And Structure Of The CSPA Further Demonstrate That All Derivative-Beneficiary Children Are Entitled To Automatic Conversion and Priority-Date Retention.

Other aspects of the CSPA's text and structure further demonstrate statutory coverage of all derivative-beneficiary children and not only those connected with F2A petitions.

First, Congress specifically declined to use the restrictive language employed by an immigration regulation in place at the time the CSPA was passed. When Congress drafts legislation, it takes notice of agency regulations connected with that legislation

and often adopts language from those regulations if such language achieves the result that Congress seeks to advance. If, however, a regulation's language is contrary to Congress's goals, that language is often omitted.

A pre-CSPA age-out regulation contained language limiting its scope, yet Congress omitted any such limitation when drafting the CSPA. Before passage of the CSPA, that immigration regulation (which is still in effect today) permitted derivative beneficiaries of an F2A petition to retain their priority date—but only if the same petitioner filed a subsequent F2B petition:

> [I]f the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. *Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.*

8 C.F.R. § 240.2(a)(4) (emphasis added). This regulation contains clear language limiting its reach to derivative-beneficiary children under "a second preference spousal" (*i.e.*, F2A) petition. Congress was aware of this regulation, yet did not insert its limiting language, or any other limiting language, into the CSPA. *See, e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 581-82 (1978) (holding that Congress's decision to omit pertinent regulatory limitations shows its intent to exclude them).

Second, both paragraph (1) and paragraph (3) state that they are to be used "for the purposes of

subsectio[n] . . . (d)," which is the subsection of Section 1153 that specifically permits derivative eligibility. 8 U.S.C. § 1153(h)(1) & (3); *see also id.* § 1153(d). As the Solicitor General concedes, and as the Members agree, paragraph (1) covers all derivative-beneficiary children, and so the reference to subsection (d) in paragraph (1) encompasses all derivative-beneficiary children as well. *See* Pet. Br. 6. When Congress then used the same phrase in paragraph (3), only a few lines down the page, it clearly meant for that phrase to encompass the same individuals as it did in paragraph (1), thus bringing all derivative-beneficiary children within the scope of paragraph (3). The Court has acknowledged this commonsense principle of crafting legislation. *See Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (discussing the "presumption that a given term is used to mean the same thing throughout a statute").

Third, the Solicitor General's position would impute to Congress an intent to discriminate against United States citizens in favor of LPR aliens. The principal beneficiary of an F2A petition is the spouse (or minor child) of an LPR alien. *See* 8 U.S.C. § 1153(a)(2)(A). Any derivative-beneficiary children of an F2A petition are thus also the relatives of an LPR alien. In contrast, the principal beneficiary of an F3 or F4 petition is, respectively, the adult child or the sibling of a United States citizen. *See id.* § 1153(a)(3)-(4). Accordingly, the children who benefit derivatively from those petitions are the relatives of actual United States citizens.

The Solicitor General argues that paragraph (3)'s features inure only to the benefit of principal and derivative beneficiaries of F2A petitions, and that F3 and F4 derivative beneficiaries, who are the relatives of United States citizens, receive no such benefits. In

other words, the Solicitor General's position would view Congress as having prioritized the interests of LPR aliens and their relatives over the interests of United States citizens. But there is no reason to believe that Congress would have treated relatives of United States citizens less favorably than relatives of LPR aliens. Instead, through the CSPA, Congress extended *the same rights* to both LPR aliens and United States citizens by granting them both the benefits of automatic conversion and priority-date retention for derivative-beneficiary children.

C. The Solicitor General's Attempt To Manufacture Ambiguity Erodes Congress's Ability To Effect Its Will Through Clear, Unambiguous Draftsmanship.

The Solicitor General argues that, despite its clarity, Section 1153(h)(3) is subject to reinterpretation by the BIA because there is "tension" between the clear language requiring coverage of all derivative-beneficiary children and the mandatory requirement that those enjoying this coverage receive automatic conversion of their petitions to the appropriate category. *See* Pet. Br. 17 ("[I]t is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous . . . ."); *see also* 8 U.S.C. § 1153(h)(3).

The "tension" that the Solicitor General identifies, however, is not some unavoidable conflict with another clear statutory command such that otherwise unambiguous language extending the CSPA's protections to all derivative-beneficiary children "must give way." *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Rather, the Solicitor General simply argues that, under the BIA's current procedures, automatic conversion cannot be bestowed on children who are derivative beneficiaries of F3 and F4 petitions, and thus they cannot

qualify for *any* CSPA protection—neither automatic conversion nor priority-date retention. *See* Pet. Br. 25-26.

There is nothing to suggest that automatic conversion is impossible for F3 and F4 derivative-beneficiary children. The Solicitor General notes that the original sponsor in an F3 or F4 petition is either the parent or sibling of the principal beneficiary; thus, the original sponsor would be the grandparent or aunt/uncle of the petition's derivative-beneficiary child. *See* Pet. Br. 25. There is no category of petition for grandparents or aunts/uncles to sponsor their grandchild or niece/nephew. The Solicitor General argues, therefore, that under current BIA procedures, a new petition—*i.e.*, an F2B petition in which an LPR alien directly sponsors an adult child, *see* 8 U.S.C. § 1153(a)(2)(B)—would need to be filed by the derivative-beneficiary child's parent once the parent has become an LPR alien. *See* Pet. Br. 25-26. According to the Solicitor General, the need for this new petition filed by a different individual prevents automatic conversion. *See ibid.*

But neither the Solicitor General nor the BIA has offered any reason that an F3 or F4 petition could not "automatically" be converted into an F2B petition. Once the parent of the derivative-beneficiary child receives a visa, that parent is an LPR alien. At that point, the agency could automatically regard the derivative-beneficiary child's old petition, originally approved as an F3 or F4, as having been approved as an F2B. This may not be how the agency currently conducts its business, but that is immaterial: Agencies are expected to conform their procedures to law.

Additionally, Section 1153(h)(3) bestows two distinct benefits. In the event that an alien meets the only condition of that paragraph—that his age, as calculated under paragraph (1), is at least 21—"the

alien's petition shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date." 8 U.S.C. § 1153(h)(3) (emphasis added). Congress used the word "and" to indicate two separate benefits, neither of which is dependent on the other. *Cf. United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (holding that, when the word "and" separates two types of recovery, "[b]y the plain language of the statute, the two types of recovery are distinct"). Thus, even assuming that automatic conversion is not available for derivative-beneficiary children of F3 and F4 petitions, the independent benefit of priority-date retention would nevertheless endure. There is no reason that priority-date retention "must give way" in the face of allegedly impossible automatic conversion.

The Solicitor General's continuing insistence that the CSPA is ambiguous raises serious institutional concerns. While Congress can and often does rely on agency expertise to fill intentionally placed gaps in statutory language, it does not typically give an agency *carte blanche* to rewrite statutory language that is clear simply because the agency declares that the statute contains "tension." The Solicitor General's attempt to read ambiguity into a statute simply because the requirements of the statute diverge from preexisting agency procedures undermines the authority of Congress. This Court should reject that attempt and reaffirm the agency's duty to carry out the mandates of a congressional statute.

* * *

Congress's unmistakable purpose for enacting the CSPA was to restore fairness to immigration procedures and to preserve the unity among immigrant families. The CSPA, as enacted, serves these twin goals by extending the statute's benefits to all derivative-beneficiary children.

The plain language of the CSPA requires that the BIA allow all children who age out, including derivative beneficiaries, to automatically convert their petition and retain their priority date. The statute clearly indicates that, so long as "the age of [a derivative beneficiary] is determined under paragraph (1) to be 21 years of age or older," that individual's petition "shall automatically be converted to the appropriate category," and the individual "shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). Because the ages of *all* beneficiary children are calculated under paragraph (1) of the CSPA, the statute requires automatic conversion and priority-date retention for any of those children who age out by exceeding the 21-year age limit.

Furthermore, the omission of language from an existing regulation that limited priority-date retention to F2A derivative beneficiaries buttresses the conclusion that the CSPA unambiguously contains no such limitation. Congress also used terminology throughout the CSPA that, if read consistently, as Congress expected it would be, indicates that the CSPA covers all beneficiary children. Otherwise, the CSPA's protections would extend only to the relatives of LPR aliens, while denying those same protections to the family members of United States citizens.

In the face of such an unambiguous congressional mandate, the existence of alleged "tension" between the statute and preferred agency procedure is not sufficient to generate ambiguity where none exists. Congress has enacted a law that is clear on its face; the agency must act to faithfully carry it out.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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November 4, 2013

AMICUS CURIAE BRIEF

No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,

v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit organizations and professional associations dedicated to the fair and orderly administration of the immigration laws. As prominent organizations in the immigration litigation and advocacy fields, *Amici* share a significant interest in the proper application of the Child Status Protection Act and in ensuring that the Act applies in the ameliorative fashion that Congress intended. *Amici* offer this brief to assist the Court by demonstrating the real-life effects of the government's flawed interpretation of the statute.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has appeared as amicus before federal courts and the Board of Immigration Appeals urging a broad interpretation of the Child Status Protection Act consistent with its ameliorative intent.

The American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and

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[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties consent to the filing of this brief.

teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Asian Americans Advancing Justice (Advancing Justice) promotes a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders (AAPIs) and other underserved communities. Advancing Justice comprises four independent non-profit, non-partisan affiliates: Asian Americans Advancing Justice | AAJC in Washington, D.C.; Asian Americans Advancing Justice | Asian Law Caucus in San Francisco; Asian Americans Advancing Justice | Chicago; and Asian Americans Advancing Justice | Los Angeles. Advancing Justice's collective work on a range of issues includes litigation, direct legal representation, policy advocacy, and community empowerment and mobilization in immigrant communities. Advancing Justice affiliates are among the nation's premier authorities on immigration policy as it affects AAPI families and communities.

The Mexican American Legal Defense and Educational Fund (MALDEF) is the leading Latino legal organization in the United States focusing on litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 45 million Latinos living in the United States including those seeking family reunification. Protecting the

rights of immigrants is the focus of MALDEF's Immigrant's Rights Program. MALDEF monitors federal and state proposed legislation, submits comments on matters that affect the fair and equitable treatment of immigrants, and participates in litigation to further its mission.

The National Immigrant Justice Center (NIJC) is a non-profit organization accredited by the Board of Immigration Appeals to provide immigration assistance since 1980. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults, detained minors, and victims of human trafficking. NIJC serves hundreds of immigrant families and other non-citizens facing removal and family separation, including through the visa petition process and applications for permanent residency based on family-based visa petitions. In 2012, NIJC provided legal services to more than 10,000 non-citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2002, Congress enacted the Child Status Protection Act (CSPA) to ameliorate a problem that immigrant families face when, after waiting years or even decades for visas, one or more of their children has reached 21 years of age and thus is no longer eligible to immigrate together with the family as a derivative beneficiary. Among other remedies, the CSPA permits such "aged-out" children to retain their original priority dates, rather than being forced to begin the long wait for a visa all over again as adults. The government contends, however, that the CSPA's priority date retention remedy applies only to one

narrow category of family-preference visa beneficiaries. *Amici* submit this brief to illustrate the ways in which the government's unduly narrow interpretation of the statute is inconsistent with current agency practice and imposes significant hardship on families, in direct contravention of the CSPA's purpose of keeping families together.

ARGUMENT

U.S. immigration law permits U.S. citizens and lawful permanent residents (LPRs) to file visa petitions on behalf of certain qualifying noncitizen family members. The Immigration and Nationality Act (INA) specifies preference categories based on the relationship between the citizen or LPR and his or her alien family member. There are several preference categories under which U.S. citizens and LPRs may petition for visas for their relatives: F1 (unmarried adult sons or daughters of U.S. citizens), F2A (spouses and minor children of LPRs), F2B (unmarried adult sons or daughters of LPRs), F3 (married sons or daughters of U.S. citizens), F4 (brothers and sisters of U.S. citizens). 8 U.S.C. § 1153(a)(1)-(4). There are similar preference categories for employment-based visa petitions for skilled professionals and other specified workers and investors. *See id.* § 1153(b).

The INA limits the total number of immigrant visas issued each year, the number of visas that can be issued to family members of a single foreign state, and the number of visas that can be granted to individuals in each preference category. *See id.* §§ 1151(c), 1152(a)(2), 1153(a). Beneficiaries receive visas based on "the order in which a petition on behalf of each such immigrant is filed," and the petition filing date is referred to as the "priority date." *Id.* §1153(e)(1).

Lengthy backlogs for family-preference visa petitions often force immigrants to wait years and sometimes decades before a visa becomes available.[2]

The immigration system allows parents who are beneficiaries of family- and employer-sponsored immigration petitions (the "principal beneficiaries") to list their children as "derivative beneficiaries." For example, if a U.S. citizen petitions for his noncitizen sister, the sister's minor, unmarried children can be included on the petition as derivative beneficiaries. So long as they are no older than 21 years of age and unmarried when the parent becomes eligible for a visa, child derivative beneficiaries are "entitled to the same status, and the same order of consideration" as their parents. 8 U.S.C. § 1153(d). However, if a child turns 21 before a visa becomes available, the child is no longer eligible to join his or her parent as a derivative beneficiary, a problem known as "aging out."

In 2002, Congress enacted the CSPA in order to ameliorate the harsh effect of this aging out problem, which is caused by administrative delays in the processing of visa petitions and long immigration backlogs. *See* 147 Cong. Rec. S3275 (daily ed. Apr. 2, 2001) (proposing the CSPA in part to address the

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[2] In the F3 category, for example, the current priority date for nationals of most countries is February 8, 2003, meaning those individuals have been waiting more than ten years for a visa. *See* Bureau of Consular Affairs, U.S. Department of State, *Visa Bulletin* at 2 (Nov. 2013), *available at* http://travel.state.gov/pdf/visabulletin/visabulletin_november2013.pdf. For nationals of Mexico or the Philippines, the backlog is even worse. In the F3 category, the government is currently processing visas for individuals from those countries who were the beneficiaries of petitions filed back in 1993. *Id.*

problem in which "growing immigration backlogs in the immigration visa category caused the visa to be unavailable before the child reached his 21st birthday"). Rather than forcing principal beneficiaries to choose whether to immigrate and join their relatives in the United States, leaving their now-adult children behind, or instead to stay with their children in their home countries, separated from their U.S. family members, the CSPA provides two remedies. First, for purposes of determining eligibility to remain a derivative beneficiary, a child's age is reduced by the amount of time the government took to approve the petition. 8 U.S.C. § 1153(h)(1). Second, if the child's age is calculated to be over 21 after applying this formula, the child's petition "shall automatically be converted to the appropriate category and the [child] alien shall retain the original priority date issued upon receipt of the original petition." *Id.* § 1153(h)(3). Section 1153(h)(3) thus provides the aged-out child credit for the years she waited in line with her family as a child, rather than making her begin the wait all over again in the F2B category as an adult.

The government contends that section 1153(h)(3) provides this ameliorative remedy to only one narrow class of child beneficiaries: those listed on petitions in the family-preference F2A category. *Amici* submit this brief to demonstrate that the government's restrictive interpretation of the CSPA is inconsistent with current agency practice and imposes significant hardship on families, in direct contravention of

Congress's intent.[3]

I. THE GOVERNMENT'S INTERPRETATION OF THE CSPA TEARS FAMILIES APART, IN CONTRAVENTION OF THE CSPA'S PURPOSE

The government's interpretation of the CSPA undermines Congress's very purpose in enacting the CSPA—keeping families together. *Amici*'s clients and constituents have experienced firsthand the harsh effects of the government's unduly narrow construction of the statute. These families continue to suffer the consequences of the age-out problem that Congress intended to alleviate when it enacted the CSPA.

A. Congress Enacted The CSPA To Promote Family Unity

From its inception, a central goal of the INA was to preserve family unity. The Act was "intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020. Family unity has remained a "cornerstone of U.S. immigration policy," in recognition of the fact that "'[t]he reunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation.'" H.R. Rep. No. 101-723, at 38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6717 (citation omitted). As the

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[3] The government's interpretation is also inconsistent with the plain language of the statute for all of the reasons stated in Respondents' brief.

Court has recognized, "Congress has accorded a special 'preference status' to certain aliens who share relationships with citizens or permanent resident aliens" in order to further that goal. *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977). The importance of family unity to U.S. immigration law is nowhere clearer than in the INA's derivative beneficiary provision, which provides that a minor child "shall ... be entitled to the same status, and the same order of consideration" as her parent. 8 U.S.C. § 1153(d).

Congress enacted the CSPA to remedy the unfair and difficult situation families face when a child beneficiary ages out during the family's long wait for a visa. The CSPA sought to remedy that aging out problem to "facilitate[] and hasten[] the reuniting of legal immigrants' families." 148 Cong. Rec. H4991 (daily ed. July 22, 2002) (Rep. Sensenbrenner); *see also id.* (Rep. Jackson-Lee) ("[W]here we can correct situations to bring families together, this is extremely important .... [T]his is an important bill that helps those who are aging out and brings families together."). In particular, section 1153(h)(3)'s priority date retention provision provides the aged-out child credit for the years she waited in line with her family as a child, rather than have to begin the wait all over again in the F2B category as an adult.

B. The Government's Interpretation Of The CSPA Undermines Its Purpose

The government now denies that the CSPA was intended to have this ameliorative effect for a large majority of visa beneficiaries seeking to keep their families together through the INA's family-preference and employment provisions. Instead, the government contends, Congress intended "to work only a limited

change—one that modestly expanded the scope of an existing regulatory provision." Pet. Br. 18. In particular, the government contends that section 1153(h)(3) applies to only one narrow set of child beneficiaries: those who are listed as beneficiaries of F2A petitions filed by LPR parents. *Id.* at 24. The government's interpretation denies the CSPA's ameliorative remedy to the thousands of children who are derivative beneficiaries of any other type of petition, including petitions filed by U.S.-citizen relatives.

In *Amici*'s experience, this unduly narrow interpretation of the CSPA has dramatic consequences for families attempting to immigrate to the United States together. The examples provided here illustrate vividly the heartbreak caused to thousands of families by the government's interpretation. Each of the children discussed here was a derivative beneficiary of a visa petition filed on his or her parent's behalf. Unfortunately, due to the world-wide demand for a limited number of visas in family- and employment-based preference categories, each of these children aged out before a visa became available to his or her parents, even after application of the age-preservation formula found in section (h)(1) of the CSPA.[4]

H.L., for example, is a native of Cambodia who must live apart from her widowed mother and her three younger brothers, who were able to immigrate to the United States through a family-preference visa. In 1992 H.L.'s uncle, a U.S. citizen, filed an F4 petition listing H.L.'s father as a principal beneficiary. DOS

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[4] The case files for the examples in this brief are on file with counsel for *Amici* and will be provided to the Court upon request.

No. PHP2006573001.[5] H.L., her mother, and her three younger siblings were derivative beneficiaries of that petition. Twelve years later, the family's priority date became current and H.L.'s mother and siblings were able to immigrate to the United States. H.L., however, had turned 21 during the twelve-year wait, and thus had aged out of eligibility as a derivative beneficiary and was not able to immigrate with her family.

One year after the family immigrated to the United States, H.L.'s father was killed in Massachusetts when he was struck by a car while he was crossing the street. H.L. could do nothing to help, and could not even attend her father's funeral. As a result, her mother must work full time and raise her three younger children on her own, without the help of her eldest daughter. Although H.L.'s mother filed an F2B petition on H.L.'s behalf, H.L. had to begin the wait for a visa all over again in the F2B category, with no credit for the twelve years that she properly and patiently waited in line. And as soon as H.L. married (although she later divorced), her mother's F2B petition became void because those visas are available only to unmarried adult children of LPRs. H.L.'s mother could file a new petition for H.L. as an unmarried adult child, but that would require H.L. to wait years more for a visa and to remain unmarried while she waited. If H.L. had been able to retain her priority date after aging out, as the CSPA provides, she would have been able to immigrate close in time to her family and would long ago have been reunited with them in the United States.

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[5] The "DOS" number is the case number assigned by the U.S. Department of State when a noncitizen applies for a visa through a U.S. consulate abroad.

Consider the similar situation faced by K.M.K., an Iranian youth who was left alone in his home country after his family immigrated to the United States. K.M.K. was a derivative beneficiary of an F4 petition filed on behalf of his father. No. A062648903.[6] The petition had a priority date of November 13, 2000, which became current almost twelve years later, in May 2012. By this time, however, K.M.K. had aged out, having turned 21 in 2002. K.M.K.'s parents and their youngest child entered the United States on September 15, 2012. After entering the United States, K.M.K.'s parents filed a new F2B petition for their adult son. Although they requested that K.M.K.'s new petition retain his priority date from the original petition, the government denied the request. Had K.M.K. been permitted to retain the original priority date, a visa would already be available for him, as that priority date is current in the F2B category. Because it was denied, however, he remains in Iran, isolated from the rest of his family.

The harsh results that flow from the government's restrictive interpretation are most evident in cases involving children who have aged out by only a matter of weeks or months. Myung Hye You, for example, is a Korean national who was a derivative beneficiary of an employment-based third preference (EB3) visa petition with a priority date of December 2, 2007. *See* No. A088587071. That priority date became current five and a half years later, on May 2, 2013. Ms. You turned

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[6] The "A" numbers cited here are alien registration numbers that the Department of Homeland Security assigns to an individual when he applies an I-485 application to adjust to LPR status or, for individuals living outside the United States, when a visa is issued.

21 on January 28, 2012, but applying the CSPA's age-preservation formula, Ms. You aged out on November 2, 2012, only months before her family's priority date would become current. By that turn of bad luck, Ms. You was left behind in her home country, away from her family, and will have to begin the five- to ten-year wait for a visa all over again before she can join her family in the United States.

Many immigrants are forced to endure separation from immediate family for years, and sometimes decades, often without any reasonable prospect of reunification on the horizon. Consider the family of U.S. citizen Duong Van Turong. On December 15, 1998, Mr. Turong filed an F3 petition on behalf of his daughter, her husband, and their three children. No. A057200535. That petition was approved on August 1, 1999. The family's priority date became current on January 1, 2006, and Mr. Turong's daughter, her husband, and their youngest child became LPRs on April 3, 2007. By that date, however, her two older children had aged out. On June 4, 2007, Ms. Turong filed F2B petitions for her two aged-out children, and asked to have them assigned the family's original priority date of December 15, 1998. That request was denied.

The three siblings continue to live apart. The youngest sibling has since become a U.S. citizen and filed an F4 petition on behalf of his sister, Hanh Ho, who married after her family left for the United States. That category's current priority date is August 8, 2001; in other words, those who had petitions filed more than twelve years ago are just receiving their visas today. Their brother, Hieu Ho, is currently single and so he remains in the F2B line, for which the current priority

date is October 1, 2006. Should Hieu Ho choose to marry, however, he will be ineligible in that category and will have to begin the wait all over again for the third time in yet another new category.

As these examples illustrate, despite waiting patiently for years or even decades for a visa to become available, and for no reason other than the fact that one of their children reached the age of 21 before that visa came available, families are being faced with the impossible decision of fulfilling their long-awaited dream of immigrating lawfully to the United States or instead staying in their country of origin in order to keep their families together. These families, whose children frequently age out mere months shy of a current priority date, must choose between creating a better life for themselves and their younger children, while facing years of separation from their older children, or giving up their dream of immigration in favor of family unity. If they choose separation, the consequences for both the family members in the United States and the children left behind can be devastating.

These stories underscore the extent to which the government's interpretation of the CSPA has veered far off the rails from Congress's intent. These children do not seek to "vault ahead of other aliens already waiting in the F2B line." Pet. Br. at 40. Rather, they seek to retain the priority dates their families secured them, without having to start the wait all over just because they had the bad fortune of turning 21 before their family's priority date became current—a circumstance obviously beyond their control.

II. THE GOVERNMENT'S INTERPRETATION OF THE CSPA IS INCONSISTENT WITH CURRENT AGENCY PRACTICE

The government's interpretation of the CSPA not only denies the statute the ameliorative effect Congress intended it to provide for the vast majority of individuals waiting in line for visas, but that interpretation is fundamentally inconsistent with current agency practice. The government contends that 8 U.S.C. § 1153(h)(3) cannot apply to aged-out beneficiaries like respondents' children, who were derivative beneficiaries of F3 or F4 petitions. The government argues that section 1153(h)(3) applies only to a "more limited group of aliens"—those who are a principal or derivative beneficiary of an F2A petition. Pet. Br. at 19-20; *id.* at 23-24. According to the government, only those petitions can "automatically be converted" (from F2A petitions to F2B petitions) because "the identity of the petitioner does not change, and the conversion can take place seamlessly." *Id.* at 24-25; 8 U.S.C. § 1153(h)(3). According to the government, permitting an F3 or F4 petition to "automatically be converted" to the F2B category once the parent becomes an LPR is "a change in the fundamental character of the petition" that "would be at odds with a basic premise of the immigrant-visa system." Pet. Br. at 27.

The government relies on its construction of section 1153(h)(3)'s automatic conversion provision to argue that it is impossible for non-F2A beneficiaries to retain their families' original priority dates under the statute, and thus that Congress could not have meant that provision to apply to such beneficiaries. *See* Pet. Br. at 34-37. Rather than conferring an actual benefit, the

government construes the priority date retention provision as "provid[ing] the needed clarification" as to "*when* the conversion takes place." *Id.* at 35. According to the government, permitting non-F2A beneficiaries to retain their families' priority dates without the precise form of automatic conversion the government identifies "would introduce considerable uncertainty into the workings of the immigrant-visa system," demonstrating that "Congress presumably would have provided for it much more directly had it been intended." *Id.* at 36.

The government's limited interpretation of priority date retention is curious in light of the U.S. Citizenship and Immigration Services' (USCIS) actual practice under the CSPA. The agency's practice has not been consistent, but in the experience of *Amici* and their clients and constituents, it differs from the government's current interpretation of the statute in several respects. The government's assertion here that "[t]here are serious problems .... with any attempt to extend [section 1153(h)(3)] eligibility to an F3 or F4 petition" (*id.* at 25) is simply not borne out in the agency's practice. Rather, USCIS often (although inconsistently) has "seamlessly" permitted aged-out children in all family-preference categories to retain their original priority dates when they move to the F2B category—and not simply those who move from the F2A category to the F2B category.

First, the agency sometimes permits aged-out children to retain their priority dates without the type of automatic conversion the government now deems necessary to facilitate that retention. Take, for example, the case of M.P., a national of Haiti. No. A089486875. M.P. was a derivative beneficiary on an

F4 petition filed on behalf of her father on April 14, 1994. M.P. had aged out by the time her father's priority date became current. On April 24, 2007, M.P.'s father filed an F2B petition on her behalf, and she sought adjustment of status using the original April 14, 1994, priority date.[7] On October 4, 2007, without any apparent concern about whether or how the petition could automatically be converted, USCIS approved M.P.'s application, permitting her to retain the April 14, 1994, priority date and join her father in the United States. The agency apparently did not agree with the United States' position here that priority date retention is simply "needed clarification" as to "*when* the conversion takes place." Pet. Br. at 35.

Indeed, the agency in some cases permits non-F2A beneficiaries to retain their original priority dates even though there may be a delay between the time when the parent attains LPR status and the time when the parent files a new F2B petition. Consider, for example, the case of Trisha Anne Motong and her sister Abigail Anne Casas, nationals of the Philippines. Nos. A86925640 (Trisha), A89620887 (Abigail). On October 19, 1988, Trisha and Abigail's U.S. citizen grandmother filed an F3 petition on behalf of their mother, Leticia. Leticia's husband, Trisha, Abigail, and two other children were derivative beneficiaries of that petition. Decades later, Leticia's priority date became current and she immigrated to the United States. She became an LPR on April 12, 2006. By then Trisha and Abigail had aged out and could not join their family as derivative beneficiaries. On September 26, 2006,

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[7] Adjustment of status is the process by which a noncitizen who is within the United States gains LPR status. *See* 8 U.S.C. § 1255.

Leticia filed an F2B petition listing Trisha as the principal beneficiary. After coming to the United States on a non-immigrant visa, Trisha filed an application for adjustment of status on July 11, 2007, which the agency denied.

In April 2006, Abigail entered the United States on a temporary non-immigrant visa. She also filed an application for adjustment of status, arguing that the CSPA entitled her to automatic conversion to an F2B petition and the retention of her family's October 19, 1988, priority date. On October 3, 2008, an immigration judge (IJ) issued an opinion finding Abigail eligible for adjustment of status in the F2B category under section 1153(h)(3) of the CSPA. Despite the fact that the identity of the petitioner changed (from Abigail's grandmother to her mother) and that there was a delay of at least several months between the time when Abigail's mother became an LPR and the time that Abigail sought to convert her petition, the IJ permitted the conversion. Then, in light of the decision in Abigail's case, USCIS reopened Trisha's case. The agency found that its previous denial was due to "administrative error," and permitted Trisha to retain her original 1988 priority date. USCIS, U.S. Department of Homeland Security, Service of Motion to Reopen, *In the Matter of No. A86925640* (June 15, 2009). It does not appear that either the IJ or USCIS considered this relief to be "a change in the fundamental character of the petition" that "would be at odds with a basic premise of the immigrant-visa system." Pet. Br. at 27.

So too did the agency "seamlessly" convert the petition of Hetal Vithalani, a national of India. *See* USCIS, Homeland Security, Notice of Action, *In the*

Matter of Vithalani, No. A089365136 (Sept. 9, 2008). Ms. Vithalani was a derivative beneficiary of an F4 petition filed on a parent's behalf, but aged out before her original priority date became current. When her parent became an LPR, the agency approved an F2B petition for Ms. Vithalani, permitting her to retain the priority date from the original F4 petition. Likewise, M.K. was a derivative beneficiary of an F4 petition that his U.S. citizen uncle filed for M.K.'s father with a priority date of November 1, 1989. The priority date became current in 2001, but by that point, M.K. had aged out, having turned 21 on March 8, 1997. M.K.'s father, mother and younger sibling adjusted status on April 5, 2003. M.K.'s father then filed an F2B petition on his behalf and sought to apply the priority date from the earlier F4 petition. Applying the automatic conversion language of 8 U.S.C. § 1153(h)(3), the immigration judge applied the earlier priority date from the F4 petition. *See* Hearing before the Immigration Judge, *In the Matter of M.K.*, No. A96196186 (June 18, 2007). M.K. was thus able to adjust his status and legally remain with his family in the United States. As these cases demonstrate, the agency does not appear to be struggling with the "serious problems" the government's argument suggests it would face in these circumstances. Pet. Br. at 25.

Second, the agency is requiring the parents of F2A beneficiaries—the one category to which the government concedes the CSPA applies—to file *new* petitions in the F2B category in order to retain their priority dates, a practice which the government now contends is anathema to "automatic" conversion. The government takes the position that section 1153(h)(3)

"largely serves to codify a regulation that existed prior to its enactment"—8 C.F.R. § 204.2(a)(4). Pet. Br. at 45. The agency has not since the CSPA's enactment in 2002 promulgated any new regulations to implement the automatic conversion provision that the government deems so integral for section 1153(h)(3) to have effect. Rather, the agency continues to operate under the terms of 8 C.F.R. § 204.2(a)(4). Most notably, the agency continues to require aged-out *F2A beneficiaries* to file new petitions in the F2B category, rather than "seamlessly" converting the petitions as the government contends the CSPA requires. *See, e.g.*, USCIS, U.S. Department of Homeland Security, *Adjudicator's Field Manual* § 21.2(c)(5) (requiring "a separate petition" where "the derivative child of a second preference beneficiary reaches the age of 21 years prior to the issuance of a visa to the principal alien parent"), *available at* http://www.uscis.gov/laws/afm (last updated June 22, 2012); USCIS Office of Communications, *Question & Answer: USCIS National Stakeholder Meeting* at 1-2 (May 2, 2008) ("In regards to F2A preference cases, current Service policy follows 8 CFR 204.2(a)(4). Essentially, when the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required."), *available at* http://www.uscis.gov/sites/default/files/files/nativedocuments/may_qa_060408.pdf.

This practice is fundamentally at odds with the government's representation here that any kind of "editing" of the petition (by, for example, filing a new petition) "would be at odds with a basic premise of the immigrant-visa system." Pet. Br. at 27. Rather, the agency permits such "editing," and in fact in some

cases *requires* it, just as it did before the CSPA, at least with respect to F2A beneficiaries. In short, there is simply no basis for the government's disingenuous contention that doing so for all derivative beneficiaries would cause disruption to the United States visa system.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 4, 2013